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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~274.~~ 534

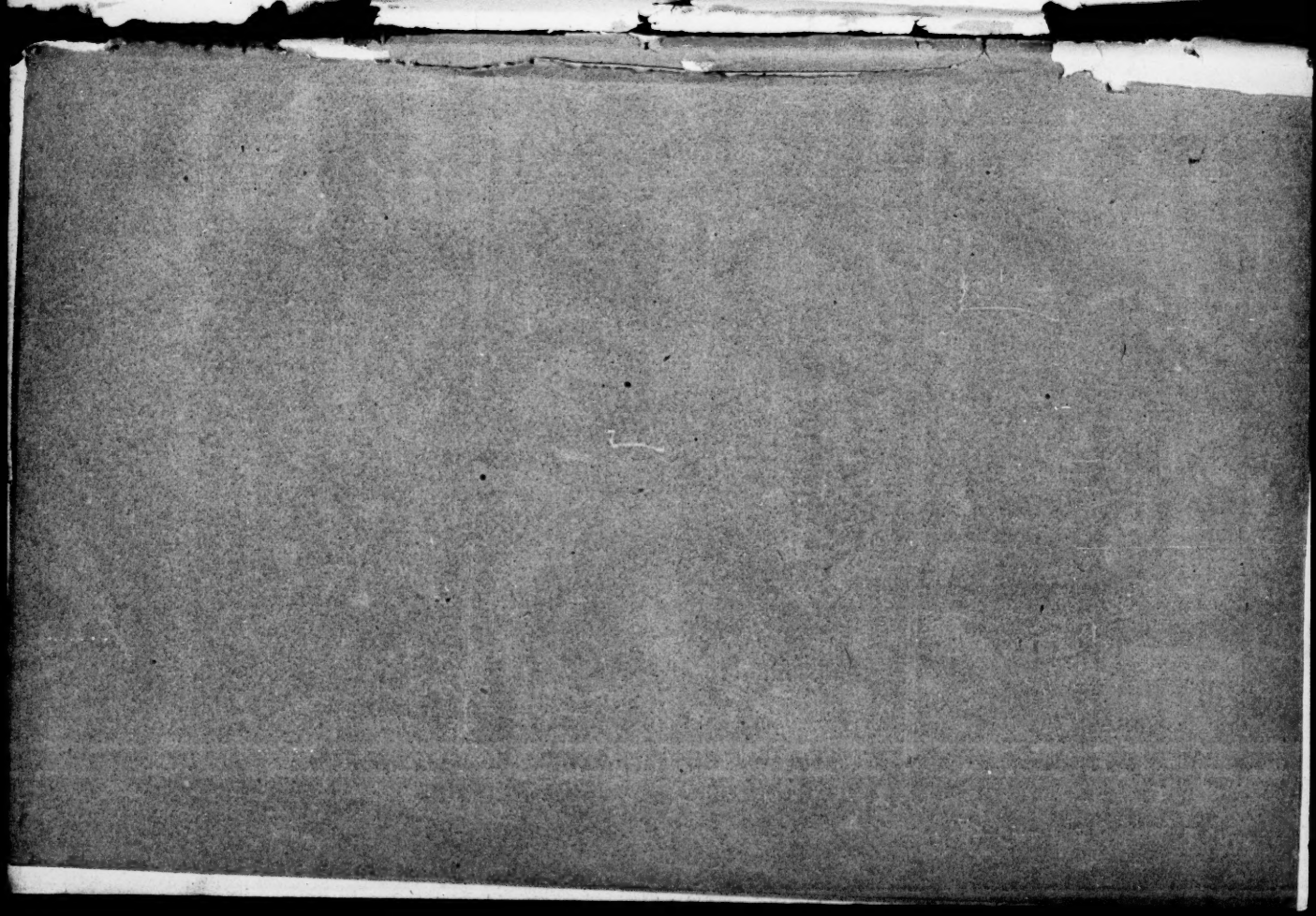
WILLIAM J. PHILLIPS AND JOHN HANCOCK, PLAINTIFFS IN ERROR,

vs.

ALBERT G. MOORE.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

FILED OCTOBER 17, 1876.



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1 Circuit court of the United States for the eastern district of Texas, in the fifth circuit, holding sessions at Galveston.

ALBERT MOORE, PLAINTIFF,
v.
WILLIAM J. PHILLIPS AND JOHN HANCOCK, defendants.
} Law. Present number 730, old number 878.

Be it remembered, at a regular term of said court, begun and held at the court-rooms thereof in the city of Galveston, in and for said district, on the first Monday in the month of May, in the year of our Lord one thousand eight hundred and seventy-six, and continued by adjournment to and including the 25th day of May, in the year of our Lord one thousand eight hundred and seventy-six.

Present, Hon. Amos Morrill, judge, presiding; D. J. Baldwin, district attorney; William J. Phillips, U. S. marshal, and C. Dart, clerk.

Among other proceedings were the following, that is to say:

On said last named day, it being a day of said term, the said cause having been duly tried, a final judgment was rendered therein by said court in favor of said plaintiff and against said defendants; and said defendants having applied for and obtained a writ of error, and filed the same in the clerk's office of said court, wherein it is commanded
2 that the record and proceedings in said cause, with all things concerning the same, together with said writ, be returned to the Supreme Court of the United States, to be held at Washington on the second Monday in October next (1876):

Therefore, in obedience to the said writ hereunto annexed, the said record and proceedings in said cause, with all things concerning the same, are here set out, in words and figures following, to wit:

3 *Motion to substitute petition.—Filed June 24th*, 1872.

In U. S. circuit court, eastern district of Texas, at Galveston.

ALBERT MOORE
vs.
HORTON & DEADRICK.
} 878.

Now comes D. D. Atchison, attorney for the plaintiff in the above entitled and numbered cause, and represents to the court that the original petition in this cause has been lost; that he has made repeated and diligent search for the same and has not been able to find. He further says that to the best of his knowledge and belief, that there is no copy of the said petition in existance, and no means of obtaining a copy.

He further represents that the said petition was a petition in an action of trespass to try title, and for damages, in the ordinary form, for the recovery of one-fourth of a league of land in Wharton County, Texas, originally granted to John Dinsmore, and also for damages for the occupation of the same.

Wherefore, he moves the court to permit him to file a petition in the place of the original petition which has been lost, and of the same date as the original.

DAN'L D. ATCHISON.

Sworn to & subscribed before me June 24th, '72.

C. DART, *Clk.*

The foregoing petition is endo'sed as follows, viz: No. 878, C. L.
4 730. Albert Moore vs. Horton & Deadrick. Motion to substitute papers. Filed June 24th, '72.

C. DART, *Clerk.*

Order.—Leave to substitute petition.—From minutes May term, June 24th, 1872.

ALBERT MOORE
v.
HORTON & DEADRICK. } Old number 878.

On motion of the attorney for the plaintiff, and satisfactory proof that the original petition in this cause has been lost or destroyed without the fault of the plaintiff, it is ordered by the court that the plaintiff have leave to file a petition in the place of the original petition which has been lost, and of the same date as the original, provided, however, that this order may be set aside upon good cause shown by the defendants.

Petition substituted.—Filed April 13th, 1860.

UNITED STATES OF AMERICA,
Eastern District of Texas:

ALBERT MOORE, PLAINTIFF,
vs.
ALBERT C. HORTON & THOS. H. DEADRICK, defts.

To the honorable J. C. Watrous, judge of the district court for the eastern district of Texas:

The petition of Albert Moore, who resides at North Anson, in
5 the State of Maine, and who is a citizen of the State of Maine, complaining against Albert C. Horton & Thomas H. Deadrick, who reside in the county of Wharton, and each of whom are citizens of the State of Texas.

For that whereas heretofore, to wit, your petitioner on the first day of January, A. D. 1860, and for a long time previous thereto, was, and is now, the owner and possessor, seized and possessed of the same in his own right, and in fee simple, of the following-described tract and parcel of land, to wit: One fourth of a league of land, originally granted by the Mexican Government to John Dinsmore, a colonist in the colony of Stephen S. Austin, situated in the county of Wharton, on the right bank of the creek called Peach Creek, joining and below the league of land of the neighbor Martin Allen, beginning the measure at the lower of the league of the said Martin Allen, whose land-mark is a cotton-wood, marked upon one side $\frac{\text{L 1}}{\text{W. C.}}$ and on the other side $\frac{\text{L 2}}{\text{W. C}}$. A line was drawn south 20° west six thousand six hundred and thirty varas, to an elm sapling marked with notches, from which another elm, 10 inches diameter, marked D, bears south 70° west one vara distant, and an oak, 10 inches in diameter, marked C, bears north 75° E $\frac{1}{2}$ vara distant from said point, and another line south 45° east nine hundred and thirty varas, and planted a stake from which an elm 12 inches diameter, marked with a X, bears north 58° east 2 varas, and another elm, marked
X, bears south 58° west. From this point another line was drawn
6 north 20° east to the aforesaid creek, to a white sapling in the edge of the water, from which a cottonwood, 30 inches diameter, marked X, bears north 68° west 8 varas distant, and an elm 8 inches diameter bears south 51° east 5 varas distant. From this

point followed the creek up to close to the point of beginning, and containing one-fourth part of a league of land. And being so possessed and seized in fee simple, and of his own right, as aforesaid, of all the aforesaid and herein described tract of land, the said defendants, with force and arms, broke the close of petitioner, and unlawfully seized and entered the same, cutting down the trees, &c., and to the great damage of petitioner; and that the said defendants still hold the same, to the great wrong, injury, and damage of petitioner.

Wherefore your petitioner brings suit, and prays that the said Horton & Deadrick, the defendants, be duly cited to be and appear at the next regular term of this court to answer this petition. Petitioner further prays for a judgment for the land, and all damages for the unlawful detention of the same, and for all costs in this behalf expended, and for such other and further relief as unto equity and law belong, and for general relief.

ALBERT MOORE,
By his att'y, DANL. D. ATCHISON.

The foregoing petition is endorsed as follows, viz: No. 730, 878.
7 Albert Moore, plaintiff, vs. A. C. Horton & Thos. H. Deadrick, d'f'ts. Petition.

This action is brought as well to try title as for damages.

DAN'L D. ATCHISON,
Att'y for Pl'f.

Filed May 16th, 1873, to date as of April 13th, 1860.

C. DART, *Clerk.*

ATCHISON, *P. Q.*

Order, leave to plaintiff to amend.—From the minutes, May term, May 17th, 1873.

ALBERT MOORE
v.
A. C. HORTON & THOMAS H. DEADRICK. } 730, 878.

On motion, leave is given the plaintiff to amend.

Amended petition.—Filed May 17th, 1873.

UNITED STATES OF AMERICA,
Eastern District for State of Texas:

ALBERT MOORE, PL'F,
vs.
A. C. HORTON, THOS. H. DEADRICK, & W. J. Phillips, defendants. } No. 878.

And now comes the plaintiff, by his attorney, by leave of the court, and amends his original petition in the above entitled and numbered cause, and suggest the death of A. C. Horton, and, also, that Thomas H. Deadrick, the other defendant, has ceased to have any further
8 possession of the tract of land described in the original petition.

And petitioner avers that said tract of land is now in the possession of one William J. Philips, who resides in the county of Wharton,

and is a citizen of the State of Texas, and is a necessary party to this suit.

Petitioner avers, as in his original petition, that the said W. J. Philips, on the 1st day of January, 1872, and with the full knowledge that petitioner was lawfully seized and possessed of the tract of land in his original petition described, holding the same in fee simple, entered upon said premises and ejected petitioner therefrom, and unlawfully withholds from petitioner the possession thereof, to his damage five hundred dollars; that the premises so entered upon, and unlawfully withheld by the said defendant from petitioner, are bounded and described as fully set forth in his original petition; that said premises consist in part of six hundred acres of land, upon which there is now standing and growing a large number of trees, and of great value, to wit, the sum of three thousand dollars; and also of fences, houses, dwelling, and gin-house, also of great value, to wit, the sum of three thousand dollars. Petitioner avers that the annual rent of said premises is really worth the sum of five hundred dollars.

Wherefore petitioner brings this his suit, and prays that the said defendant, W. J. Philips, be duly cited to be and appear at the next regular term of court, to answer this suit, and that petitioner have restitution of the above-described premises and for his damages, and all costs in this behalf expended, and such other and further relief as unto equity & law belong, and for general relief.

ALBERT MOORE,
By his att'y DAN'L D. ATCHISON.

9 GALVESTON, *May 14th*, 1873.

I hereby waive the necessity of the issuance or the service of any writ or process required to be served on me in the within entitled and numbered cause, and accept such service thereof; and also waive the necessity of serving me with a copy of the original petition in said cause, and accept such service thereof.

WM. J. PHILLIPS.

The foregoing amended petition is endorsed as follows, viz: No 730, 878. Albert Moore, pl'f, vs. A. C. Horton et al. & W. J. Philips, dfts.

This action is brought as well to try title as for damages.

DAN'L D. ATCHISON.

Amended petition filed May 17th, 1873.

C. DART, *Clk.*

Interrogatories to Robert Peebles.

In the circuit court of the U. S., eastern dist. of Texas, at Galveston.

A. G. MOORE
vs.
W. J. PHILLIPS.

Interrogatories propounded by defendant to Robert Peebles, of De Witt County, Texas, which, with answers thereto, will be read in evidence on the trial of the above cause.

1st. How long have you resided in Texas?

10 2. Did you know Kinchin Holliman?

3. Of what country was he a resident in the year 1828, and before then and afterwards?

4. State what facts you may know material to establish his place of residence at the times mentioned, and your means of information.

BALLINGER & QUINAN,
For Def't.

Cross interrogatories to Robert Peebles.

Cross-interrogatory 1. Will you please state when, where, and under what circumstances you knew Kinchen Holliman? What occupation had he during your acquaintance with him?

ATCHISON & WAUL, WALKER & WALKER.

The foregoing interrogatories are endorsed as follows, viz: A. G. Moore vs. W. J. Phillips. Interrogatories to Robert Peebles.

Agreement of counsel as to taking deposition of Robert Peebles.

Commission waived, and it is agreed that the deposition of the witness may be taken to these original and cross-interrogatories by any officer and returned as under State practice.

ATCHISON & WAUL,
For Pl'ff.

11 *Answers and depositions of Robert Peebles.*

In the circuit court of the U. S. eastern distric' of Texas, at Galveston.

A. G. MOORE
vs.
W. J. PHILLIPS.

Answers and depositions of Robert Peebles, a resident citizen of De Witt County, Texas, to the accompanying interrogatories propounded to him in the above-entitled cause, taken before J. N. Edgar, a notary public in and for De Witt County, Texas, in accordance with the accompanying agreement.

To the first interrogatory he answers:

1. I moved into Texas in the year eighteen hundred and twenty-nine.

In answer to 2nd interrogatory:

2. I did.

3. I understood that he lived in the State of Misssissippi.

Answer to the 4th inter'og':

4. The ayuntamiento gave notice to him and some others to establish their domicils in Texas, or place of residence, which I think was in 1831, & which he failed to do, as their report will show.

Cross inter'g':

1. Answer. I think it was in 1831 he came to Texas. During that visit I was introduced to him. I saw but little of him; was informed he was a planter in the State of Missis'ippi.

ROB'T PEEBLES.

12 THE STATE OF TEXAS,
County of De Witt:

I, J. N. Edgar, notary public for precin't No. 2, in and for De Witt County, Texas, do hereby certify that the foregoing answers of Robert Peebles, the witness before named, were mad' before me, and were sworn to and subscribed before me by the said witness.

Given under my hand and o'ficial seal this 31st day of December, A. D. 1873.

[L. S.]

J. N EDGAR.
Notary Public De Witt County, Texas.

The foregoing answer to direct & cross-interrogatories is endorsed on envelope as follows, viz: Across seal: J. N. Edgar, notary public. On face: Address clerk circuit court United States, eastern district of Texas, Galveston, Texas. A. G. Moore, pl'f, vs. W. J. Phillips, defendant. Deposition of Robert Peebles for defendant. C L., 730, 870..

Received this package from the hands of J. N. Edgar.
J. C. WOODWORTH,
Dep't Postmaster.

Received from the post-office, Galveston, Texas, January, 6th. 1874.
C. DART, *Clerk.*

13 Opened by order of court, at request of W. P. Ballinger, of counsel of for def'ts.
C. DART, *Clk.*

JAN. 16TH, '74.

Order, leave to John Hancock to make himself party defendant, & leave to both parties to amend.—From the minutes Dec'r term, 1873, Jan'y 19th, 1874.

ALBERT MOORE
v.
A. C. HORTON ET AL. } 730, 878.

Upon application of John Hancock by his attorneys, he has leave to make himself a party defendant to this suit.

And upon application of both parties by their counsel leave is granted them to amend.

Answer of def't Wm. J. Phillips.—Filed Jan'y 19th, 1874.

U. S. circuit court, eastern district of Texas, at Galveston.

ALBERT MOORE
vs.
A. C. HORTON, THOMAS H. DEADRICK, & WM. J. Phillips.

Now comes the defendant, Wm. J. Phillips, by his attorney, and, not waiving motion filed by him to dismiss, says that the plaintiff's petition, and the matters and things therein contained, as therein stated and set forth, are not sufficient in law, and this defendant is not bound to make other or further answer to the same.

And he shows that this defendant could not properly be introduced as a defendant in said cause by way of amendment; and that the
14 matters set forth in said pretended amendment cannot be set forth by way of amendment, but is a new and distinct cause of action, and that there is no original action on suit in this court.

Wherefore defendant prays judgment, &c.

Defendant not waiving his motion or demurrer, denies all the allegations in plaintiff's original and amended petitions, and says that he is not guilty of the alleged trespasses or wrongs, or any of them, set forth in the plaintiff's petition, and of this he puts himself upon the country.

GEORGE QUINAN,
Att'y for Def't.

Answer of def't Phillips cont'd.

And the defendant, William J. Phillips, for further separate and special defence in this cause, answers and says, that *that* the plaintiff claims the land in controversy by virtue of a pretended grant to John Dinsmore made April 23rd in the year 1833, which said grant was null, void, and of no effect in law, because prior thereto, to wit, on or about the 3rd day of August, 1824, the same identical land had been granted by valid and perfect grant to one Bartlett Sims, a colonist of Austin's colony. And that the landlord of this defendant, John Hancock, of Travis County, holds and owns the said land, by virtue of the said prior grant to Bartlett Sims, and mesne conveyances down to him, this defendant being his tenant and agent to occupy and hold the said land.

And that the grant to said Bartlett Sims was and has ever con-
15 tinued the prior, better, and superior title to said land, and the pretended title of said plaintiff was from the beginning null and void; that said plaintiff never was in possession of said land or any part thereof, from the date of his pretended grant to the present time; that possession thereof has always been under the said grant to said Sims.

And this defendant expressly denies all trespass on the plaintiff and all other allegations in plaintiff's petition.

Wherefore he prays judgment, &c.

GEORGE QUINAN,
BALLINGER & JACK & MOTT,
For Defendant.

The foregoing answer is endorsed as follows, viz: 730. Albert Moore vs. Wm. J. Phillips et al. Answer of defendant Phillips. Filed Jan'y 19th, 1874. C. Dart, cl'k. Def'ts' ans. No. 1. Quinan, Ballinger, Jack, & Mott, for Phillips.

Order, continuance.—From the minutes, May term, July 1st, 1874.

ALBERT MOORE
v.
A. C. HORTON ET AL. } 738, 878.

Continued.

Order, continuance.—From the minutes, Dec'r term, 1874, Jan'y 8th, 1875.

ALBERT MOORE
v.
A. C. HORTON & THOMAS H. DEADRICK. } 730.

Continued.

16 *Order, continuance.—From the minutes, May term, May 13th, 1875.*

ALBERT MOORE
v.
HORTON & DEADRICK. } 730.

Continued.

Order, continuance.—From the minutes, Dec'r term, 1875, Jan'y 18th, 1876.

ALBERT MOORE
v.
A. C. HORTON & THOMAS H. DEADRICK. } 730, 878.

Continued.

Order, leave to both parties to amend.—From the minutes, May term, May 22d, 1876.

ALBERT MOORE
v.
HORTON & DEADRICK. } 730, 878.

Upon application leave is given both parties to amend.

Order, John Hancock enters his appearance.—From the minutes, May term, May 22d, 1876.

ALBERT MOORE
v.
HORTON & DEADRICK. } 730, 878.

This day came John Hancock, a citizen of the county of Travis and State of Texas, by his counsel, Ballinger, Jack & Mott, and George Quinan, and in accordance with his pleadings filed, enters his appearance as a party defendant in this suit, as landlord of Wm. J. Phillips, defendant, his tenant in possession of the land sued for in the plaintiff's petition.

17 *Entry of appearance of John Hancock, answer and amended answer.—Filed May 22, 1876.*

Circuit court of the U. S., eastern district of Texas.

ALBERT G. MOORE
vs.
W. J. PHILLIPS. } Law. 730.

Now comes John Hancock, a citizen of Texas residing in Travis County, and his tenant and agent, W. J. Phillips, having been made a defendant and served with process in this cause. And having moved to dismiss the said cause and demurred to the petition and amended petition therein; and also filed his answer thereto, reserving all rights under said motion and demurrer, the said Hancock enters himself a defendant in the room and stead of said W. J. Phillips, reserving, claiming, and insisting on all the objections to said suit so made by his said tenant, and adopting and setting up the same identically as if he, said

Hancock, had been originally made party in place of said Phillips, and had made the same answer and alleged the same matters by way of demurrer and answer to the plaintiff's cause; and this defendant substitutes himself for said Phillips, and makes and unites in the same motion, demurrer and answer precisely as made in said cause by said Phillips.

And, with leave of the court, said Hancock as defendant amends and further answers, and says that the grant to said Bartlett Sims was as a colonist grant of Austin's colony; that said Sims remained a resident thereon and in the colony, republic, and State of Texas continuously to the date of his death in the year 1870, and said grant was and always remained valid, perfect, and in full force, being the older and
18 prior grant, and covering the same ground, and that said land was from the date thereof to the present time, claimed, held, possessed, and occupied by the said Sims, and those holding and claiming under him, and under said grant to him.

That the said pretended grant to said John Dinsmore was, on the face thereof, null and void, and made without any authority in the pretended granting officer therefor, as appears on the face thereof, and was made without the assent and against the will of the empresario of said colony, and was made with no authority whatsoever but that of the pretended commissioner who executed the same.

GEO. QUINAN,
BALLINGER, JACK, & MOTT,
Att'ys for John Hancock.

The foregoing entry of appearance is endorsed as follows: Law. 730, 878. Albert Moore vs. W. J. Phillips. Entry of appearance, &c., of John Hancock. Filed May 22nd, '76. C. Dart, cl'k. Def't's ans. No. 2.

Plaintiff's exception & replication.—Filed May 22, '76.

ALBERT G MOORE }
vs. }
WM. J. PHILLIPS ET AL. }

And the plaintiff excepts to the answer this day filed, making
19 Hancock a party, and asks that all that part of said answer which pretends to set up the title of plaintiff throug' a grant to J. Dinsmore be stricken out, no such title being set forth in the petition or other pleadings of plaintiff.

ATCHISON AND WAUL,
For Plaintiff.

And for replication to defendant's answer, plaintiff says that if any such grant as is alleged was made to Bartlett Sims, that said Sims on or about the 5th of May, 1828, sold, bargained, and conveyed the said land to one Kinchin Holliman; that said Kinchin Holliman, in the said year, abandoned the country, and all of the lands he then pretended to hold, by the laws of the land were declared forfeited, and that the land for which this suit is brought was, by the adjudication of the proper officer, declared forfeited, and the same condemned and declared vacant, and that said adjudication was valid, legal, of full force, and the said decree has in no manner been annulled, and this plaintiff is ready to verify.

ATCHISON & WAUL,
For Plaintiff.

The foregoing exception and replication is endorsed as follows, viz: C. L. 730, 878. Albert Moore vs. Wm. J. Phillips. Plaintiff's exception and replication. Filed May 22nd, '76. C. Dart, cl'k.

20 *Amended petition.—Filed May 22, 1876.*

ALBERT MOORE
vs.
HORTON & DEADRICK ET AL.

And the plaintiff, by leave of the court first & obtained, amends his petition and avers that the said defendant Phillips entered into possession, claiming under the said Deadrick, and holding in privity with said Deadrick, as his tenant in said land.

ATCHISON & WAUL,
For Plaintiff.

The foregoing amended petition is endorsed as follows, viz: No. 730, 878. Albert Moore vs. Horton & Deadrick. Amended petition. Filed May 22nd, '76. C. Dart, clerk, by James T. Spann, dep't.

Order, leave to defendants to amend.—From the minutes, May term, May 22d, 1876.

ALBERT MOORE
v.
HORTON & DEADRICK. } 730, 878.

Upon application, leave is given the defendants to amend.

Defendants' demurrer & answer.—Filed May 22, '76.

U. S. circuit court.

ALBERT MOORE
vs.
PHILLIPS & HANCOCK. } 730.

21 And now on the coming in of the plaintiff's third amendment, this day, alleging possession taken by Phillips under Deadrick, defendants Phillips and Hancock renew their demurrer, and shew and allege that no right or ground is shown for making said Phillips a defendant in this cause by amended petition.

Wherefore they pray judgment.

For further answer, should said demurrer be overruled, defendants deny the allegations in said amended petition, and pray judgment, &c.

QUINAN, BALLINGER, JACK & MOTT,
Att'ys for Def'ts.

The foregoing demurrer & answer is endorsed as follows, viz: No. 730, 878. Albert Moore vs. Phillips & Hancock. Demurrer and answer. Filed May 22nd, '76. C. Dart, clerk, by James T. Spann, dep'ty.

Plaintiff's replication.—Filed May 22, 1876.

ALBERT MOORE
vs.
WM. J. PHILLIPS ET AL.

And the plaintiff, by leave of the court first had and obtained, amends

his petition, and by way of replication to defendants' answer says
22 that he denies that the land in controversy in this action was, on or about the 3rd of August, 1824, or at any other time, granted to Bartlett Sims, as alleged, or that John Hancock holds or owns said by virtue of grant to Bartlett Sims, and mesne conveyances to him, said Hancock, as alleged, and plaintiff avers that said pretended grant to Bartlett Sims, if any such there was, was adjudicated forfeited, and the said land condemned and declared vacant, by competent authority, and the judgment and decree of Miguel Arcinega, commissioner, made on the 23rd of April, 1833, an officer fully authorized to act in that behalf; & plaintiff denies each and every other allegation set up in defendants' answer; and further, plaintiff avers that the value of the said tract of land is ten thousand dollars, all which plaintiff is ready to verify.

ATCHISON & WAUL,
For Plaintiff.

The foregoing replication is endorsed as follows: C. L., 730, 878 Moore vs. Phillips et al. Replication. Filed May 22nd, 1876. C. Dart, cl'k.

Defendants' demurrer & gen'l denial.—Filed May 22, 1876.

U. S. circuit court.

ALBERT MOORE
vs.
W. J PHILLIPS & OTHERS. } 730.

Now come the defendants Hancock and Phillips, and plaintiff's amendment having been filed this day, said defendants demur to
23 (second demurrer) so much of said amended answer as alleges the adjudication of the forfeiture of said grant by the decree of Miguel Arceniega, commissioner, made April 23rd, 1833, because they say that no sufficient facts are alleged and shown to constitute any valid adjudication of forfeiture of a grant. That said commissioner had no lawful power or authority to make any such adjudication. That the facts constituting such adjudication are not sufficiently alleged, set forth, or shown in said amendment. Wherefore defendants pray that the same be adjudged insufficient, and pray judgment, &c.

Should said demurrer be overruled, then the said defendants deny all the allegations in the plaintiff's said amendment contained, and say they are not, nor is either of them, guilty of any of the wrongs or trespasses in the plaintiff's petition and amended petition complained of.

QUINAN, BALLINGER, JACK & MOTT,
Att'ys for Def'ts.

The foregoing demurrer and general denial is endorsed as follows, viz: 730. Albert G. Moore vs. Phillips & others. Defendants' demurrer and general denial. Filed May 22nd, '76. C. Dart, cl'k. Def 'ts' ans'r No. 3.

24 *Defendants' demurrer and answer.—Filed May 22d, 1876.*

ALBERT G. MOORE
vs.
HANCOCK & PHILLIPS. }

The said defendants, with further leave of the court, after the filing

of plaintiff's second amendment filed this day, says: (3rd demurrer) that they renew their demurrer as to said adjudication on the grounds stated in their demurrer to the allegations of an adjudication in the other replication.

Should plaintiff's demurrer be overruled, they deny all the averments in the said amendment. They deny any conveyance by Bartlett Sims to Kinchen Holliman.

They allege that Kinchen Holliman never was a resident, inhabitant, or a domicil'ated citizen of Mexico or Texas, or any part thereof, but was always a resident and inhabitant of the State of Mississippi, and an alien to Mexico or Texas; and that the title to said league of land always remained in said Bartlett Sims until conveyed by him to Thomas F. McKinney, the vendor of these defendants.

QUINAN, BALLINGER, JACK & MOTT,
Att'ys for Def'ts.

The foregoing demurrer and answer is endorsed as follows, viz: C. L., 730, 878. A. G. Moore vs. Phillips & others. Defendants' demurrer and answer. Filed May 22nd, '76. C. Dart, cl'k. Def'ts answer No. 4.

Agreement of counsel.—Filed May 22, 1876.

ALBERT MOORE, PL'FF,
vs.
A. C. HORTON.

It is agreed that the petition filed on May 16th, 1873, is in lieu of the original petition filed April 13th, 1860.

ATCHISON & WAUL,
For Plaintiff.
QUINAN & BALLINGER,
For Def'ts Phillips & Hancock.

The foregoing agreement of counsel is endorsed as follows, viz: C. S. 730. Albert Moore vs. Horton & Deadrick. Agreement of counsel. Filed May 22nd, '76. C. Dart, cl'k.

Memoranda from old docket.—Filed May 22d, 1876.

Memd. from old docket in case No. 878.

ALBERT MOORE
vs.
HORTON & DEADRICK.

From appearance docket May term, 1860.—Filed April 13th, 1860.

It is agreed that the answer may be filed at any time during the term and the case continued.

Dec'b'r term, 1860.

Filed April 13, '60. Answer in & cause continued.

The foregoing memoranda from old docket is endorsed as follows, viz: C. L., 730, 878. Memd. for Mr. Atchison. Memoranda from old docket. Filed May 22nd, '76. C. Dart, cl'k.

Agreement of counsel waiving a jury.—Filed May 22d, 1876.

ALBERT G. MOORE
vs.
W. J. PHILLIPS & JOHN HANCOCK & OTHERS.

In the above cause, by agreement of the parties, a jury is waived, and the said cause is submitted to the judge of the court for trial with law and the facts.

ATCHISON & WAUL,
For Plaintiff.
QUINAN, BALLINGER, JACK & MOTT,
For Def'ts.

The foregoing agreement is endorsed as follows, viz: C. L., 730. Albert Moore vs. Horton & Deadrick. Agree't in writing waiving a jury. Filed May 22nd, '76. C. Dart, cl'k.

Order.—Trial begun and rulings on pleadings.—From the minutes, May term, May 22d, 1876.

ALBERT MOORE
v.
HORTON & DEADRICK. } 730, 878.

27 On this 22d day of May, A. D. 1876, this cause came on for trial, and thereupon came the plaintiff, Albert Moore, by his attorneys, and the defendants, W. J. Phillips and John Hancock, appearing by their attorneys, thereupon the said parties, by their counsel, waived a jury, by writing signed by them, and submitted the questions as well of fact as of law to the court.

Thereupon, the pleadings being presented, the plaintiff's exceptions to the defendants' answer, in so far as the same alleges that the plaintiff claims under John Dinsmore, came on to be heard, and being considered by the court, the said exceptions are sustained; and then came on to be heard the demurrer and exceptions of the defendant Phillips to the making of said Phillips a party in this case, and the said demurrer and exception was sustained by the court; whereupon the plaintiff, by leave of the court, amended his petition, and the said defendant renewed his demurrer to said amendment, and the demurrer was overruled.

The second demurrer of the defendants Phillips and Hancock to the amendment of plaintiff, upon the ground that said amendment alleged the adjudication of the forfeiture of said grant by the decree of Miguel Arciniega, commissioner, made April 23d, 1833, and the third demurrer of same defendants to the amendment filed by plaintiff were both heard by the court and were overruled; and the defendants Hancock & Phillips, having filed an agreement in writing, signed by their coun-
28 sel, waiving a jury, and submitting the cause for trial to the court, and the court having heard the evidence, and the trial of the case not being concluded, the further consideration thereof is postponed until to-morrow for argument.

Order, 2d day's trial.—From the minutes, May term, May 23d, 1876.

ALBERT MOORE
v.
HORTON & DEADRICK. } 730, 878.

On this day again came the parties to this cause as on yesterday, and

thereupon the argument of counsel was begun, and the same not being concluded, the further consideration of the case is postponed until to-morrow.

Judgment.—From the minutes, May term, May 25th, 1876.

ALBERT G. MOORE
v.
PHILLIPS & HANCOCK. } 730, 878.

The court having heard the evidence and allowed the bills of exceptions presented by the said defendants, as are shown by a statement of evidence and of said exceptions signed by the judge, and of record in the cause, the defendants Phillips & Hancock, in addition to the grounds set forth in their said bill of exceptions, prayed the court to decide for said defendants, because no sufficient evidence of any conveyance by Bartlett Sims to Holloman was proved in the cause; no sufficient
29 evidence of a forfeiture of the prior title to said Holloman was shown; and because the alienage and non-residence of said Holloman at the time of the alleged conveyance to him by Sims was admitted in the cause, and said conveyance, therefore, vested no right or title in said Holloman, but the title and right remained in said Sims; but the court refused to grant said prayers.

And finding that the grant to the said John Dinsmore, proved in said cause, was a sufficient forfeiture of the prior grant to said Sims, and of the adjudication of the vacancy of said land at the date thereof, and that the title of said Dinsmore has been conveyed to the plaintiff, does hereby consider and adjudge that the plaintiff, Albert G. Moore, do have and recover of and from the defendants, W. J. Phillips and John Hancock, the said quarter of a league sued for in plaintiff's original and amended petition, to wit, one-fourth of a league of land originally granted by the Mexican Government to John Dinsmore, a colonist in the colony of Stephen F. Austin, situated in the county of Wharton, on the right bank of the creek called Peach Creek, adjoining and below the league of land of the neighbor Martin Allen, beginning the measure at the lower of the league of the said Martin Allen, whose landmark is a cottonwood marked upon one side $\frac{L}{w}\ \frac{I}{c}$ and on the other side L 2, a line was drawn south 20° west, six thousand six hundred and thirty varas, to an elm sapling marked with notches, from which another elm
30 10 inches diameter, marked D, bears south 70° west, one vara distant, and an oak ten inches in diameter, marked C, bears north 75° E., ½ vara distant; from said point drew another line south 45° east, nine hundred and thirty varas, and planted a stake, from which an elm 12 inches diameter, marked with a X, bears north 58° east, 2 varas, and another elm, marked X, bears south 58° west; from this point another line was drawn north 20° east, to the aforesaid creek, to a white sapling in the edge of the water, from which a cottonwood 30 inches diam'ter, marked X, bears north 68° west, 8 varas distant, and an elm 8 inches diameter bears south 51° east, 5 varas distant; from this point followed the creek up to close to the point of beginning, and containing one-fourth part of league of land; together with all costs about this suit expended. And that plaintiff have his writ to obtain the possession of said land and his execution for costs.

31 *Defendants' bill of exceptions.—Filed May 25th*, 1876.

In the circuit court of the United States for the eastern district of Texas, at Galvéston.

ALBERT G. MOORE,
vs.
WILLIAM J. PHILLIPS & JOHN HANCOCK.

Be it remembered that on the trial of the above-entitled cause, after reading the pleadings, the plaintiff, to maintain the issue on his part, offered to read in evidence the testimonio, and a land-office translation thereof, of a grant from the Mexican Government to John Dinsmore, dated April 23, A. D. 1833. To which the defendants, Phillips & Hancock, excepted, on the following grounds:

1st. That the said grant to Dinsmore was void on its face, as it discloses a paramount superior outstanding title to the land in controversy in Bartlett Sims.

2nd. That the commissioner, Arceniega, had no power to issue it.

3rd. That he issued it of himself, against the consent of the agent of the empresario, and in violation of the additional article of his instructions as commissioner.

4. That it pretended to declare vacant lands as abandoned without any adjudication thereon of the ayuntamiento, or alcalde, or any lawful authority.

32

5. That it specially reserves the rights of Bartlett Sims in the land as first proprietor and lord of the soil, recognizes them, and does not purport to divest them.

6. That the said grant is not legal evidence that Holliman ever owned the land, or that Sims had ever sold it to him. These exceptions were overruled by the court, and the said grant was then read, which is as follows:

Def'ts' bill of exceptions continued.—Testimonio or grant from the Mexican Government to John Dinsmore.

Third seal. Two seals. Legalized by the State of Coahuila & Texas, for the biennial of 1828 & '29, '30 & '31, '32 & '33. Signed: Williams.

Señor COMMISSIONER:

I, John Dinsmore, a native of the United States of the North, one of the colonists of the contract of the Empresario Austin, of June 4th, 1825, respectfully expose to you:

That I am a bacheler, have emigrated to this country for the purpose of making a permanent settlement, and from 1829 to this time I have devoted my money and time to commercial business within the country; wishing to secure the portion of land conceded to me by the law, I appear before you and denounce as vacant a tract sold the 5th of May, 1828, by the colonist Bartlett Sims to Kinchen Holliman, as the said Holliman is not a citizen and cannot consider himself entitled to the rights thereof, although in 1824 he received possession of one league of land as colonist, which he forfeited for the reason of his residence in his native country, as has been declared by the ayuntamiento of this town in 1830.

33 Respectfully requesting you be pleased to admit the denounciation I make, and grant to me possession of the land allot'ed to me by law according to my condition, therefore, I pray you be pleased to do as aforesaid, by which I shall receive favor.

Town of Austin, April 13, 1833.

(Signed) JOHN DINSMORE.

TOWN OF SAN FELIPE DE AUSTIN,
April 13, 1833.

To the agent of the Empresario Stephen F. Austin, who will report upon the statement of the petitioner, and state if the tract is outside the ten littoral leagues.

(Signed) ARCINIEGA.

Señor COMMISSIONER: Agreeably to your foregoing decree, I have to say that the petitioner, John Dinsmore, is one of the colonists belonging to the contract of the Empresario Austin, of June 4, 1825, a bachelor, and of excellent morals, very honorable and business man. His statement with regard to the tract sold on the 5th of May, 1828, by the colonist Bartlett Sims to Kinchen Holliman are true and correct, and in my opinion there is no doubt that Holliman, being living out of the territory of the republic, cannot preserve a right to the tract acquired by him, by the way of sale, inasmuch as the following guaranty exists in the title or transfer made by Sims in his favor:

"And, further, to defend, at any time, the right of the said Kinchen Holliman to the said tract, being always ready to restitute to said señor the stipulated value which he has paid me for said tract, in
34 case he should forfeit it, owing to a want on my part of right thereto, or power of extending to him a title."

And said Sims having expressed to me his wish of guarantying to Holliman the $904, value of said tract, paid by him, there is, in my opinion, a prejudice to a third person, and therefore I recommend that the subject-matter be laid before the alcalde, or the illustrious ayuntamiento of this town, in order to obtain their opinion on the subject.

I decline to commit myself in that transaction.

Town of Austin, April 14, 1833.

(Signed) SAMUEL M. WILLIAMS.

Agreeably to the report made by the agent, Sam'l M. Williams, in the foregoing instrument, let this petition be transmitted to the alcalde of this town, who will inform me of the situation of the land in question, in order that I may act as required by justice.

Town of Austin, April 14, 1833.

(Signed) MIG'L ARCINIEGA.

Civil court of Austin.

Señor COMMISSIONER: In pursuance of your foregoing decree, by which you were pleased to submit to the alcalde of this town the case raised by the petition of John Dinsmore, I have to say that about three years ago, Kinchen Holliman left this colony and returned to his native country, and, in my opinion, in conformity with the laws by which we are governed, he cannot preserve any right to real estate without this republic.

With regard to the transaction of the colonist Sims, I have nothing to say, as I want of facts whereon to form an opinion.

It is all I have to say on the subject.

35 I, the citizen James B. Miller, 1st "regidor" and alcalde in turn in the absence of the alcalde, signing with assisting witnesses as required by law.

Dated as above.

(Signed) JAMES B. MILLER.

Ass't'g:
THOM. H. BORDEN.
Ass't'g:
M. R. WILLIAMS.

After having considered the statement of the agent, Samuel M. Williams, in the foregoing report, and the declaration made on the same subject by the alcalde pro tem., James B. Miller, with regard to the tract alluded to in this petition, I incline for declaring that the said tract is entirely vacant, for the reason that said Kinchen Holliman has abandoned the country and the tract since the above-mentioned epoch.

Therefore, the petitioner having denounced the said tract since last year, I grant it to him, and order that the surveyor, Thomas H. Borden, shall [survey the fourth of a league applied for by the petitioner, after citation to the owners of adjoining lands, in order to extend him herein below the corresponding title, and with regard to the special observation of the agent about the right he considers vested unto Bartlett Sims, as first owner and lord of the aforesaid tract, he preserves his right to claim it by such means as are afforded him by law.

Town of Austin, April 14, 1835.

(Signed) MIGUEL ARCINIEGA.

I, the citizen Miguel Arciniega, commissioner appointed by the supreme government of this State for distributing lands, giving possession thereof, and extending titles thereto, to the new colonists of the
36 colonization contract of the Empresario Stephen F. Austin, outside the ten littoral leagues.

Whereas the petition of the colonist John Dinsmore has been admitted, by which he applies for a grant of ¼ league of land, denouncing as vacant the tract transferred by the colonist Bartlett Sims to Kinchin Holliman on the 5th of May, 1828, and considering that agreeably to the laws by which we are governed the said Kinchen Holliman, as alien, living in another country, cannot preserve any right to real estate acquired in this republic, taking into consideration the foregoing reports of the agent of the Empresario Estevan F. Austin, Samuel M. Williams, and the alcalde ad interem, James B. Miller, dated 14th inst., and also with regard to my subsequent decree of the same date, by which I declared vacant, and once more a part of vacant lands, the same tract having previously been the property of the colonist Bartlett Sims, and by him transferred to Kinchen Holliman, I, the aforesaid commissioner, using the powers in me vested by the colonization law of the State, of March 24th, 1825, and the instructions to commissioners of September 4th, 1827, as, also the additional article of April 25, 1830, and the colonization contract entered upon by the said empresario with the supreme government of this State, of June 4th, 1825, I have determined upon granting, and in the name of the State of Coahuila and Texas do grant, confer, and put in possession, real and personal, of one fourth of a league of land, being a part of the said tract transferred by Sims to Holliman, which
37 land has been measured by the surveyor, Thomas H. Borden, previously appointed for that purpose, its location and boundaries being as follows:

Situated on the right bank of the creek, called Peach Creek, below, and bounded by Martin Allen's league, beginning at the lower corner of said Martin Allen's tract, the landmark of which is a cotton-wood, marked on one side $\frac{\text{L 1}}{\text{W C,}}$ and on the other side $\frac{\text{L 2}}{\text{W C,}}$ a line was drawn S. 20° W., 6,630 varas, to an elm stump, bearing sprouts, marked with notches, from which another elm 10 inch. dia., marked D, bears S. 70° W., one vara, and an ash 10 inch. dia., marked C, bears N. 75° W., ½ vara; thence another line was drawn S. 45° E., 935 varas, to where a stake was driven, from which an elm 12 inch. dia., marked X, bears N. 58° E., 2 varas, and another elm, marked X, bears S. 58° W., 1½ vara; thence another line was drawn N. 20° E., to said creek, where is a hackberry stump with sprouts, on the water edge, from which a cotton-wood 30 inch. dia., marked X, bears N. 68° W., 8 varas, and an elm 8 inch dia., marked X, bears S. 51° E., 5 varas; thence up the creek bank to the beginning point. Which comprehends ¼ league of land.

The said tract belongs to the class of unirrigable arable lands in its totality; which is a basis for establishing the price he shall pay the State, according to the art. 22 of said law, under the penalties therein awarded, notifying him that within one year he shall erect permanent landmarks in each angle of the tract, and must settle and cultivate it agreeably to the provisions of the law.

Therefore, using the powers in me vested by the said law and subsequent instructions, I extend the present instrument, and order
38 that a testimonio thereof shall be transcribed and delivered to the interested party, in order that he may own and enjoy the said tract unto him, his children, heirs, and successors, or whomsoever from him or them cause and right may derive. Given at the town of San Felipe de Austin, the 23rd day of April, 1833, which I signed with assisting witnesses agreeably to law.

(Signed) MIGUEL ARCINIEGA.

Assisting:
M. R. WILLIAMS.
Assisting:
C. C. GIVENS.

The testimonio was delivered on the 23rd of April, 1833.

GENERAL LAND OFFICE,
Austin, August 2nd, 1856.

I, Xavier Debray, Spanish clerk in said office, com'd and sworn, certify that the foregoing is a correct translation of the original on file in said office.

X. DEBRAY,
Spanish Clerk.

GENERAL LAND OFFICE, STATE OF TEXAS.

I, Stephen Crosby, commissioner of the general land office of said State, certify that Xavier Debray is Spanish clerk in said office, and that the foregoing is a correct translation of the title on file in said office.

In testimony whereof I have hereunto set my hand and caused the seal of said office to be affixed, at the city of Austin, this 2nd day of August, A. D. 1856.

[L. S.] S. CROSBY, *Com'r.*

39 The foregoing translation is endorsed as follows, viz: Translation of title of possession of ¼ league of land to John Dinsmore. Wharton C'y. C. L., 730, 878. Filed May 22nd, '76. C. Dart, cl'k.

To which ruling of the court permitting said grant to be read in evidence the said defendants excepts.

The plaintiff then read in evidence conveyances from said Dinsmore down to the plaintiff of the land in controversy without objection.

Defendants' bill of exceptions continued.—Deed from Irael S. Savage, adm'r of the estate of John Dinsmore, dec'd, to David Currier.

THE STATE OF TEXAS,
County of Galveston:

Know all men by these presents, that whereas, at the *the* March term of the probate court for the county of Galveston, in the estate of John Dinsmore, deceased, the following order was made, to wit:

The court having read the report of the commissioners appointed to divide and partition the estate of John Dinsmore, deceased, amongst the heirs thereof, it is ordered, adjudged, and decreed that said report be confirmed and approved, and it appearing therefrom that no equitable division of the real estate of the said Dinsmore can be made, but a sale thereof is recommended by the commissioners, it is therefore ordered, adjudged, and decreed that the administrator of said estate sell at public auction, in front of the court house door of the county of Galveston, on the first Tuesday of May next, between the hours of
40 10 a. m. and 4 o. p. m. of said day, giving first of the time, terms, and place of sale twenty full days' notice, by posting notices thereof as the law directs, and by publication in one of the newspapers printed and published in Galveston County, all the real estate belonging to said estate.

The terms whereof shall be one-fourth cash and the ballance on twelve months' credit, the credit portion to bear interest at the rate of ten per cent. per annum from the day of sale until paid, and to be secured by note with approved security and mortgage lien on the property sold.

And whereas, the undersigned did, in obedience to the foregoing order, after first giving twenty full days' notice of the time and place and terms of sale, by publication thereof in the Galveston Journal, a newspaper published in said county, and by posting notices thereof in three public places, to wit, one at the court house door of said county and two others at public places, in said county, and not in the city of Galveston, at which notices are usually posted up, on the first Tuesday of May, A. D. 1854, at the court house of said county, between the hours of 10 a. m. and 4 p. m., caused to be offered at public auction, for one-fourth cash and the ballance on a credit of twelve months, the credit portion to bear interest at the rate of ten per cent. per annum from the day of sale until paid, the following among other property of the estate of the said Dinsmore, to wit:

Situated on the right bank of the arroyo called Peach Creek, in
41 the county of Wharton, adjoining and below the sitio of Martin Allen, and the survey commencing at the lower corner of the sitio of the said Allen, having for a landmark a cottonwood tree, marked on one side $\frac{LY}{WC}$, the other side $\frac{LY}{WC}$, from whence a line drawn south twenty degrees west, six thousand six hundred varas, to an elm sprout, marked

with cuts of the ax; at the distance of one vara south 70° west is another elm ten inches in diameter, marked D, and a half vara to the north 78° east is an ash marked C, ten inches in diameter.

From this point another, south 48° east, is drawn, nine hundred and thirty-five varas, to a stake, from which, 2 varas north 58° east, is an elm, 12 inches in diameter, marked X, and 1½ varas south 58° west is another elm, marked X. From which point another line is drawn, north 20° east, to the aforesaid creek, to a hackberry sprout, to the edge of the water, from which hackberry, 8 varas north 68° west, is a cottonwood, 30 inches in diameter, marked X, and 5 varas south 51° east is an elm 8 inches in diameter. From this point, following the meanders of the creek, til' it closes with the point of begin'ing, and incloses the quarter of a sitio of land.

And whereas, at the date aforesaid, was struck off and adjudged to David Currier, at six dollars and twenty-five cents per acre, he being the best and highest bidder therefor, at said price. And whereas, at the May term of the said county court of Galveston County, the undersigned, as administrator of the said John Dinsmore, did file his report of said sale, and thereupon the following order was made:

42 It appearing to the court, from reading the duly verified report thereof and the proofs accompanying the same, that the administrator, in his sale of two certain tracts of land belonging to the estate of his intestate, complied with the terms and conditions of the order of sale, and the law regulating such matters, and that the said sale was had, held, and conducted in a fair, open, and public manner, it is therefore ordered, adjudged, and decreed that said sale be ratified, approved, and confirmed; and the said report and return thereof recorded.

It is further ordered that the administrator make such title to said land to the purchaser thereof, as the law requires, upon his complying with the terms of sale.

Now, in consideration of the premises and the further consideration of the sum of six thousand nine hundred and eighteen dollars and seventy-five cents to me in hand paid by the said David Currier, the receipt whereof I hereby acknowledge, have granted, bargained, and sold, and by these presents do grant, bargain, sell, and convey unto the said David Currier, his heirs and assigns, all the right, title, and interest that the said John Dinsmore had in his lifetime, or his estate since his death, in said tract of one fourth of a league of land herein described and set forth. To have and to hold said tract of land, together with the hereditaments and appurtenances, all and singular thereunto belonging, or in any wise appertaining, unto him, the said David Currier, his heirs and assigns forever.

In testimoney whereof I, the said Isreal Savage, administrator
43 of the estate of John Dinsmore, deceased, have hereunto set my hand and scroll seal this the second day of August, A. D. 1854.

ISRAEL S. SAVAGE. [SEAL.]
Adm'r John Dinsmore, Dec'd.

Attest:
OSCAR FARISH.
S. HANNY.

THE STATE TEXAS,
County of Wharton:

Before me, Oscar Farish, clerk of the county court of Galveston County, this day appeared Israel S. Savage, to me known, who *who* ac-

knowledged the above and foregoing instrument of writing to be his act, and as administrator of the estate of John Dinsmore, deceased, for the consideration and purposes therein stated.

Given under my hand, and seal of said county court, August 14th, A. D. 1854.

[L. S.] OSCAR FARISH, *Clk.*

THE STATE OF TEXAS,
County of Wharton:

Filed in this office for record August the 17th, 1854, at 3 o'clock p. m., and recorded this 30th day of August, A. D. 1854, at 5 o'clock p. m.

To which I certify, and affix the seal of the county court of said county.

[L. S.] J. H. DEADRICK, *Clerk & Recorder.*

THE STATE OF TEXAS,
County of Wharton:

I, J. A. Hamilton, clerk of the district court of Wharton County, Texas, do hereby certify that the foregoing is a true copy of deed from Israel S. Savage, administrator of John Dinsmore, deceased, to
44 David Currier, as appears of record in this office, in deed book A, page 509 & 510, record of deeds of Wharton County.

To certify which I hereunto set my hand, and seal of said district court, in town of Wharton, this 29th day of November, A. D. 1873.

[SEAL.] J. A. HAMILTON,
Clerk Dist. Court W. C.

The foregoing copy of deed is endorsed as follows, viz: C. L., 730, 878. Israel S. Savage, adm'r'r to David Currier. Copy of deed. Filed Dec. 13, '73. C. Dart, cl'k.

Defendants' bill of exceptions continued. Deed from David Currier to Albert Moore.

STATE OF NEW HAMPSHIRE:

Know all men by these presents, that I, David Currier, of the State of New Hampshire, for and in consideration of five dollars to me in hand paid, the receipt of which is hereby acknowledged, have granted, bargained, and sold, and by these presents do grant, bargain, sell, release and forever quit-claim unto Albert Moore, of the State of Maine the folowing-described tract of land, viz:

One-fourth of a league of land situated in the county of Wharton, in the State of Texas, and originally granted to John Dinsmore, as a colonist, and being the same tract conveyed by Israel Savage, administrator of the estate of John Dinsmore, to me, and which said
45 deed is recorded in the said county Wharton, and contains a full and more accurate description of said tract of land, and for particular and further description of the same, reference is herein made to said deed; together with all and singular the improvements, rights, hereditaments, &c., unto the said tract belonging, or in any wise appertaining.

To have and to hold the same, unto the said Albert Moore, his heirs and assigns forever; and I, the said David Currier, for myself, my heirs, &c., covenant with the said Albert Moore, his heirs, &c., to warrant and forever defend the title unto the aforesaid tract of land unto the

said Albert Moore, his heirs, &c., against the claim or claims of all persons lawfully claiming or to claim the same by, through, or under me.

In testimoney whereof I have hereunto set my hand and seal on this the ninth day of November, A. D. 1860.

DAVID CURRIER. [SEAL.]

Witness:
SAMUEL UPTON.
D. J. CLARK.

This day personally appeared before me, the undersigned authority, judge of the police court of the city of Manchester, which said court is a court of record, David Currier, to me personally well known, who declared and acknowledged that he executed the above and within conveyance for the purposes and considerations therein contained.

In testimo'y whereof I have hereunto set my hand and the seal of court, of said police court of the city of Manchester, on this 9th day of November, A. D. 1860.

46 SAMUEL UPTON,
Justice of the Police Court of City of Manchester.

Filed in this office of record the 14th day of December, 1860, at 10 o'clock a. m., and recorded this the 14th day of December, 1860, at 4 o'clock p. m.

To which I certify under my hand and official seal this 14 day of December, 1860.

T. J. WHITTEOR,
Cl'k C. C. W. C.

THE STATE OF TEXAS,
County of Wharton:

I, J. A. Hamilton, clerk of the district court of Wharton County, Texas, do hereby certify that the foregoing is a true copy of the deed from David Currier to Albert Moore, as appears of record in my office, in book B, pages 435 & 436, record of deeds, of Wharton County.

To certify which I hereto set my hand and affix the seal of the district court of Wharton County, this Nov. 29, A. D. 1873.

[L. S.] J. A. HAMILTON,
Cl'k D. C. Wharton County.

The foregoing copy of deed is endorsed as follows, viz: C. L., 730, 878. David Currier to Albert Moore. Copy of deed. Filed Dec. 13, '73. C. Dart, cl'k.

47 The plaintiff then offered to read in evidence a lease from A. C. Herton to Thos. H. Deadrick of part of the land in controversy, to the reading whereof the said defendants excepted on these grounds: 1st, that the execution thereof was not proven; 2nd, that it was irrelevant to the issue; 3, that no authority of Herton as agent for the heirs of Holliman was shown.

These objections were overruled by the court, and the plaintiff was permitted to read said lease upon reading the agreement signed by counsel, which is as follows. The court considered the agreement of parties hereinafter set forth as a waiver of proof.

Defendants' bill of exceptions continued. Agreement of counsel.—Filed Jan'y 19th, 1874.

U. S. circuit court, Galveston.

ALBERT C. MOORE
vs.
HORTON & OTHERS & W. J. PHILLIPS.

In the above cause it is agreed that title papers on both sides shall be admitted without objection as to execution, proof, &c., either side to have the right to understand from the other the title papers to be used, and saving the right to raise any question of law before the court as to the legal effect of such titles when offered.

John Hancock will be entered as a party defendant, and landlord of W. J. Phillips.

The fact is admitted that Kinchen Holliman never became a resident or citizen of Mexico or of any part of Texas, but always remained and continued a resident & citizen of the State of Mississippi.

GEO. QUINAN,
For *Hancock & Phillips.*
DAN'L D. ATCHISON,
For *P'ff.*

48 The foregoing agreement of counsel is endorsed as follows, viz: C. L., 730, 878. Moore vs. Phillips & others. Filed Jan'y 19th, 1874. C. Dart, cl'k.

Def't's bill of exceptions continued. Lease from A. C. Horton, agent of the heirs of Kinchen Holliman, to Thos. H. Deadrick.

The said lease is as follows:

THE STATE OF TEXAS,
County of Wharton:

Know all men by these presents that I, Albert C. Horton, of the county and State aforesaid, agent for the heirs of Kinchen Holliman, who reside in the county of Wilkerson, State of Mississippi, do by these presents rent or lease to Thomas S. Deadrick two hundred and fifty acres of land in the Holliman tract in the Simms league in said Wharton County, or so much of the said two hundred and fifty acres as the said Deadrick may wish to cultivate and improve. The said improvements to be made on any portion of said tract of land lying on the right-hand side of the Alabama road running from the town of Wharton so as not to include that portion which I now have enclosed and in cultivation, and the said Deadrick is to have the privilege of cutting and using as much timber on any part of said land lying on the right-hand side of the said Alabama road as will be necessary for all the improvements in putting up buildings, and fencing, and enclosing said *lease*,
and for firewood, and other purposes usual upon a plantation,
49 and the said Deadrick is to remain in peaceable possession of said land until the same shall be demanded of him by the said heirs of Holliman or their legal and authorized agent, or until he shall be dispossessed by the legal owner of said land.

Given under my hand and scroll for seal this the 1st day of June, 1858.

A. C. HORTON, [SEAL.]
Agent for the heirs of K. Holliman.

Witness:
J. H. DEADRICK.
J. T. LAUSON.

The foregoing lease is endorsed as follows, viz.: C. L., 730, 878. Filed May 22nd, '76. C. Dart, cl'k.

Def'ts' bill of exceptions continued. Testimony of Wm. J. Phillips.

To which ruling of the court permitting said lease to be read in evidence the said defendants except.

The plaintiff then introduced William J. Phillips, who testified that he is defendant in this cause. That he went into possession of the land sued for under Thomas H. Deadrick in January, 1868, as tenant for him under the lease. That George Quinan came to him in 1872 and informed him that John Hancock claimed the land, and proposed to witness to hold the land as tenant to John Hancock, which witness agreed to do. Said Quinan told him that Hancock would be enabled to compromise. Witness paid the rent for 1872 to Quinan for Hancock. He rented the land for 1873, but, being in Galveston, Mr. Atchison, attorney for plaintiff, got him to acknowledge service of the copy of petition and process as defendant in this suit, and when he saw Quinan
50 afterwards he informed him of this, that he was sued, that he would not pay any rent, but would pay the successful party, and would no longer hold as Hancock's tenant, but for whoever might be successful in the litigation. Witness stated that the land was in the possession of Horton, who said he was the agent for the heirs of Holliman for several years prior to the lease to Deadrick, but could not state the exact time. Deadrick held possession throughout said lease and until witness took possession. Witness is now in possession and will pay the party who establishes the title. He does not acknowledge tenancy to any one now. That the land is worth $10,000.

And this was all the testimony offered by plaintiff.

Defendants' bill of exceptions cont'd. Def'ts proved a grant from the Mexican Gov't to Bartlett Sims.

The defendants then, to maintain the issues upon their part, proved a grant from the Mexican Government to Bartlett Sims, dated 7th August, 1824, for a league of land No. 2, embracing the land in controversy, without objection.

Plaintiff read in evidence a deed from Bartlett Sims to Thos. F. McKinney, dated , embracing the land in controversy, as follows:

Defendants' bill of exceptions continued. Deed from Bartlett Sims to Thos. F. McKinney.

STATE OF TEXAS,
County of Bastrop:

BASTROP, *26th Oct.*, 1848.

Know all men by these presents that I, Bartlett Sims, of the county

aforesaid, for and in consideration of two thousand dollars to me in hand paid by Thomas F. McKinney, of the county of Galveston, receipt whereof is hereby acknowledged, have sold, bargained, released to the said McKinney, his heirs or assigns, all my rights of whatsoever
51 character in and to a certain league of land lying and situated on Peach Creek and old Caney, and within the former limits of Matagorda County, being league number two, granted me as my headright as a colonist under the contract of S. F. Austin for colonizing three hundred families in Texas, and I hereby substitute the said McKinney to all and singular my rights in and to said land, warranting and defending the title to the same, unto the said McKinney, his heirs and assigns, against all persons hereafter claiming or to claim the same by, through, or under me; to all of which I sign, using scroll in lieu of seal.

The words "presents in" first and second line interlined before signing.

BARTLETT SIMS. [SEAL.]

Teste:
D. F. BROWN.
GEORGE GILLESPIE.

THE STATE OF TEXAS,
County of Bastrop:

Before me, James H. Gillespie, clerk of the county court for the county of Bastrop, personally appeared Bartlett Sims, to me well known, and acknowledged that he voluntarily signed, sealed and delivered the foregoing deed to Thomas F. McKinney, for the considerations and purposes therein contained.

To certify which, I hereunto set my hand and seal of office, at Bastrop, this 25th day of October, A. D. 1848.

[L. S.] JAMES H. GILLESPIE,
Clerk County Court, Bastrop County.

RECORDER'S OFFICE.

THE STATE OF TEXAS,
County of Wharton:

52 Filed for record November 28th, A. D. 1848, 9 o'clock a. m., and recorded the 29th day of November, 1848, 3 o'clock p. m.

To certify which, I hereunto set my official name and seal the date last above written.

[L. S.] G. EAGAN,
Clerk C. C. & Recorder W. C.

THE STATE OF TEXAS,
County of Wharton:

I, Jacob Hart, county clerk of Wharton County, State of Texas, do hereby certify that the above and foregoing is a true and correct copy of the original deed from Bartlett Sims to Thomas F. McKinney, as the same appears of record in my office.

Witness my hand and official seal, this 17th day of May, A. D. 1876.

[L. S.] JACOB HART, *C. C., W. C.*
Per H. H. KIRKPATRICK, *D'p'ty.*

The foregoing copy of deed is endorsed as follows: Not necessary to produce original. Atchison & Waul for pl'ff. C. L. 730, 878. B. Sims to T. F. McKinney. Filed May 22nd, '76. C. Dart, cl'k.

Def'ts' bill of exc'pt's continued. Original deed from Thos. F. McKinney to C. C. Herbert.

Also a deed from Thomas F. McKinney to C. C. Herbert, dated , for the same land, as follows:

53 Know all men by these presents that I, Thomas F. McKinney, of the county of Travis, in the State of Texas, for and in consideration of the sum of six thousand and three hundred dollars, to me in hand paid by Claibourn C. Herbert of Colorado County, in said State, before the sealing and delivery of these presents, the receipt of which is hereby acknowledged, to my entire satisfaction, have this day granted, bargained, sold, aliened, enfeoffed, and conveyed, and by these presents do grant, bargain, sell, alien, enfeoff, and convey unto said Herbert the following tract or parcel of land situated, lying, and being in the county of Wharton in said State, east of the Colorado River, and bounded on the northeast by Peach Creek, being the head-right league of land originally granted to Bartlett Sims, as a colonist in Austin's colony, and known on the old maps as survey No. 2, to him, said Claibourn C. Herbert, and his heirs, to have and to hold the same in fee-simple forever; and I, the said Thomas F. McKinney, do by these presents hereby bind myself and my heirs to warrant and forever defend the right and title, in and to said league of land, unto said Herbert and his heirs, against the claim or claims of any and all persons whatever, claiming or to claim the same by or through me.

In testimony whereof I hereunto set my hand and seal, using a scrawl for a seal, on this the 4th day of February, anno Domini eighteen hundred and fifty-eight.

THOMAS F. McKINNEY. [SEAL.]

Attest.

THE STATE OF TEXAS,
Travis County:

54 Personally appeared before me, George W. White, notary public for said county & State, the above-named Thomas F. McKinney, with whom I am personally acquainted, and acknowledged that he executed the foregoing deed for the purposes and considerations therein stated.

In testimony whereof I have hereunto subscribed my name & affixed my official seal, at office in Austin, this the 6th day of February, 1858.

[L. S.] GEO. W. WHITE,
Notary Public.

THE STATE OF TEXAS,
County of Wharton:

I, Soloman J. Thomas, clerk of the county court of said county, do hereby certify that the above deed was filed in my office for record the 1st day of May, 1858, at 9 o'clock a. m., and that the same has been duly recorded in book B, page 232, of record of deeds.

Given under my hand and seal of said court, at office in the town of Wharton, this 5th day of May, 1858, at 5 o'clock p. m.

[L. S.] S. J. THOMAS,
Clerk County C't Wharton C'ty.

The foregoing deed is endorsed as follows, viz: No. 742. Thomas F. McKinney to C. C. Herbert. Deed filed in my office for record the 1st May, 1858, at 9 o'clock a. m. S. J. Thomas, clerk.

55 *Def't's bill of exceptions cont'd. Copy of deed from Thos. F. McKinney to C. C. Herbert.*

Know all men by these presents that I, Thomas F. McKinney, of the county of Travis, in the State of Texas, for and in consideration of the sum of six thousand and three hundred dollars, to me in hand paid by Claibourn C. Herbert, of Colorado County, in said State, before the sealing and delivery of these presents, the receipt of which is hereby acknowledged, to my entire satisfaction, have this day granted, bargained, sold, aliened, enfeoffed and conveyed, and by these presents do grant, bargain, sell, alien, enfeoff and convey unto said Herbert the following tract or parcel of land, situated, lying, and being in the county of Wharton in said State, east of the Colorado River, and bounded on the northeast by Peach Creek, being the head-right league of land originally granted to Bartlett Simms as colonist in Austin's colony, and known on the old maps as survey No. 2 to him, said Claibourn C. Herbert, and his heirs, to have and to hold the same in fee-simple forever. And the said Thomas F. McKinney do by these presents hereby bind myself and my heirs to warrant and forever defend the right and title in and to said league of land unto the said Herbert and his heirs against the claim or claims of any and all persons whatever, claiming or to claim the same by or through me.

In testimony whereof I hereunto set my hand and seal, using a scrawl for a seal, on this the 4th day of February, anno Domini eighteen hundred and fifty-eight.

THOMAS F. McKINNEY. [SEAL.]

56 THE STATE OF TEXAS,
Travis County:

Personally appeared before me, Geo. W. White, notary public for said county and State, the above-named Thomas F. McKinney, with whom I am personally acquainted, and acknowledged that he executed the foregoing deed for the purposes and considerations therein stated.

In testimony whereof I have hereunto subscribed my name and affix my official seal, at office in Austin, this the 6th day of February, 1858.

[L. S.] GEO. W. WHITE,
Notary Public, &c.

THE STATE OF TEXAS,
County of Wharton:

I, Soloman J. Thomas, clerk of the county court of said county, do hereby certify that the above deed of conveyance from Thomas F. McKinney to Claibourn C. Herbert was filed in my office for record the 1st day of May, A. D. 1858, at 9 o'clock a. m., and that the same has been duly recorded in book B, page 232, of records of deeds.

Given under my hand and the seal of said court, at office in the town of Wharton, this the 5th day of May, A. D. 1858, at 5 o'clock p. m.

[L. S.] S. J. THOMAS,
Clerk County C't Wharton C'y.

THE STATE OF TEXAS,
County of Wharton:

57 I, Jacob Hart, county clerk in and for the county of Wharton, State aforesaid, do hereby certify that the foregoing is a true and correct copy of an original deed from Thomas F. McKinney to Claiborne C. Herbert, as the same appears of record in my office.

Witness my hand and the seal of said county court, this 17th day of May, A. D. 1876.

[SEAL.] JACOB HART, *C. C. W. C.*,
Per H. H. KIRKPATRICK, *Dy.*

The foregoing copy of deed is endorsed as follows: T. F. McKinney to Claiborne C. Herbert. Not necessary to produce original. Atchison & Waul for pl'ff.

Def'ts' bill of exceptions cont'd. Agreement between Thomas F. McKinney, C. C. Herbert, & John Hancock.

Also an agreement executed by Tho's F. McKinney, and C. C. Herbert, and John Hancock, respecting said land, and an assignment by said McKinney of all his interest in said agreement to John Hancock, as follows:

This memorandum witnesseth, that whereas Thomas F. McKinney, one of the parties hereto, has by deed bearing even date herewith conveyed to Clairbourn C. Herbert, another party hereto, Barlett Sim's headright league of land, situated on the east side of the Colorado River, in the County of *of* Wharton, which conveyance, though made for the entire league, is intended only to embrace something over three thousand acres out of said league, that is all of said league not conveyed
58 by said Sims to parties now either in poss'ion of the respective parcels sold to them by themselves, their heirs or assignees, or who are and have been since the time of the sale to them been citizens of Texas, the consideration expressed in said deed is six thousand three hundred dollars; but is in fact on the following understanding: that is, said Herbert is to take possession of said league of land, and to hold possession of the same under said deed till the title be perfected by the statute of limitations, or to defend any and all suits that may be instituted to recover possession of said league from him at the mutual costs and attorney's fees of said Herbert and said McKinney in the district courts, and John Hancock is to aid such attorneys as may be employed by said Herbert & McKinney in necessary attention to such suit or suits in relation thereto, as may go up to the Supreme Court, said Hancock being also a party thereto.

And it is the understanding and agreement between all the beforementioned parties hereto, in consideration of the premises, that when the title to said land so conveyed as aforesaid to said Herbert, shall be established by suit or perfected by the statute of limitations, then the said Herbert is to reconvey to said McKinney one equal third of said land, or so much as title may be established thereto as aforesaid, and to convey to said Hancock, in like manner, another third interest in quantity and quality of so much of said land as may be held as aforesaid, and the said Herbert is to retain the remaining third interest in his own right.

It is further understood and agreed by and between all the said parties hereto that said Herbert may dispose of as much as two
59 hundred acres of said land in getting some person to take and hold possession of said land to be equally chargeable to all the parties, and whatever amounts may remain to be equally divided as before stated to all the parties hereto.

In testimony of all which the parties hereto have respectively set

their hands and seals, using scrawls for seals, on this the 4th day of February, A. D. 1858.

C. C. HERBERT. [L. S.]
THO'S F. McKINNEY. [L. S.]
JOHN HANCOCK. [L. S.]

Attest for McKinney & Hancock—
JOH. B. COSTA.
JOHN H. POPE.

THE STATE OF TEXAS,
County of Travis:

Before me, James W. Smith, a notary public for said county, duly commissioned and qualified, personally appeared John B. Costa, to me well known, one of the subscribing witnesses to the instrument of writing hereto attached, who being duly sworn states that Thomas F. McKinney and John Hancock, whose names appear to said instrument of writing, acknowledged that they executed the same for the uses, purposes, and considerations therein stated and that he signed the same as a witness at their request.

Witness my hand and affix my official seal at office in the city of Austin, this the 13th day of November, A. D. 1871.

[SEAL.] JAMES W. SMITH,
Notary Public Travis Co., Texas.

60 *Bill of exceptions of def'ts cont'd. Assignment by Tho's F. McKinney to John Hancock.*

THE STATE OF TEXAS,
Travis County:

For the consideration of one thousand dollars to me paid by John Hancock, I hereby assign, transfer, and set over to him, said Hancock, all my right and title in and to the within contract and agreement, this November 3rd, 1871.

THO'S F. McKINNEY.

Attest:
JOH' B. COSTA.
JOHN H. POPE.
[Stamp. Stamp. Stamp.]

THE STATE OF TEXAS,
County of Travis:

Before me, James W. Smith, a notary public for said county, duly commissioned and qualified, personally appeared John B. Costa, to me well known, one of the subscribing witnesses to the instrument of writing hereto attached, who being duly sworn states that Tho's F. McKinney, whose name appears to said instrument of writing, acknowledged to him that he executed the same for the uses, purposes and considerations therein stated, and that he signed the same as a witness at his request.

Witness my hand and affix my official seal at office in the city of Austin, this the 13th day of November, A. D. 1871.

[SEAL.] JAMES W. SMITH,
Notary Public Travis Co., Texas.

61 *Def't's bill of exceptions continued. Agreement of counsel.—Filed Jan'y 19th, 1874.*

The defendants read in evidence the agreement of counsel as follows:

U. S. circuit court, Galveston.

ALBERT MOORE
vs.
HORTON & OTHERS & W. J. PHILLIPS.

In the above cause it is agreed that title-papers on both sides shall be admitted without objection as to execution, proof, &c., either side to have the right to understand from the other the title papers to be used, and saving the right to raise any question of law before the court as to the legal effect of such titles when offered.

John Hancock will be entered as a party defendant and landlord of W. J. Phillips.

The fact is admitted that Hinchen Holliman never became a resident or citizen of Mexico, or of any part of Texas, but always remained and continued a resident & citizen of the State of Mississippi.

GEO. QUINAN,
For Hancock & Phillips.
DAN'L D. ATCHISON,
For Pl'f.

The foregoing agreement of counsel is endorsed as follows: C. L. 730, 878. Moore vs. Phillips & others. Filed Jan'y 19th, 1874. C. Dart, cl'k.

Bill of exceptions continued and closed.

The foregoing is certified to be all the evidence in the cause adduced by the parties, and the bill of exceptions of the defendants, which is allowed, and signed, and sealed by the court.

AMOS MORRILL,
Dist. Judge.

The foregoing bill of exceptions is endorsed as follows: C. L.,
62 730, 878. Albert G. Moore vs. Phillips & Hancock Def'ts' bill of exceptions. Filed May 25th, 1876. C. Dart, cl'k.

Order fixing am't of bond on writ of error.—From the minutes, May term, June 2d, 1876.

ALBERT G. MOORE
v.
WM. J. PHILLIPS & JOHN HANCOCK. } 730, 878.

Ordered that the amount of the bond to be executed by the defendants to perfect the writ of error applied for by them, be and is hereby fixed at the sum of one thousand dollars.

Writ of error to circ't court.—Filed June 3d, 1876.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Texas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Albert G. Moore, plaintiff, and William J. Phillips and John Hancock, defendants, in which a final judgment was made and entered by said court on the 25th day of May, A. D. 1876, in favor of said plaintiff and against said defendants, for the lands and premises
63 sued for in plaintiff's petition, the said lands and premises being valued at the sum of ten thousand dollars, a manifest error hath happened to the great damage of the said Wm. J. Phillips and John Hancock, defendants, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 30th day of May, in the year of our Lord one thousand eight hundred & seventy-six.

[SEAL.]

C. DART,
Clerk of the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

Allowed by—
AMOS MORRIL,
Dis't Judge.

64 The foregoing writ of error is endorsed as follows, viz: C. L., 730, 878. Albert G. Moore vs. Wm. J. Phillips & John Hancock. Writ of error. Filed June 3rd, 1876. C. Dart, cl'k.

Copy of writ of error lodged in clerk's office for def't in error, June 3d, 1876.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Texas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court, before you, between Albert G. Moore, plaintiff, and William J. Phillips and John Hancock, defendants, in which a final judgment was made and entered by said court on the 25th day of May, A. D. 1876, in favor of said plaintiff and against said defendants, for the lands and premises sued for in plaintiff's petition, the said lands and premises being valued at the sum of

ten thousand dollars, a manifest error hath happened to the great damage of the said Wm. J. Phillips and John Hancock, defendants, as by their complaint appears. We being willing that error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be
65 therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 30th day of May, in the year of our Lord one thousand eight hundred and and seventy-six.

[SEAL.]

C. DART,
Clerk of the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

Allowed by—
AMOS MORRILL,
Dis't Judge.

I certify that the foregoing, and on the reverse hereof, is a true and correct copy of the original writ of error issued in said cause.

To certify which, witness my hand and seal of the circuit court
66 of the United States for the eastern district of Texas, at Galveston, June 3rd, 1876.

[SEAL.]

C. DART,
Clerk U. S. Circ't Court, E. D. T., G.

The foregoing copy of writ of error is endorsed as follows, viz: C. L., 738, 878. Albert G. Moore vs. Wm. J. Phillips & John Hancock. Copy writ of error. Original endorsed as follows: Filed June 3rd, 1876. C. Dart, clk.

This copy, deposited in the clerk's office for defendants in error, June 3rd, 1876.

C. DART, *Clk.*

Filed June 3rd, '76.

C. DART, *Clk.*

Citation on writ of error.—Issued June 3d, 1876.

The United States of America to Albert G. Moore, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 2nd Monday of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the eastern district of Texas, at Galveston, wherein William J. Phillips and John Hancock are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaint-
67 iff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 3rd day of June, in the year of our Lord one thousand eight hundred and seventy-six.

[L. S.] AMOS MORRILL,
Dis't Judge.

On the sixth day of June, in the year of our Lord one thousand eight hundred and seventy-six, personally appeared W. R. McFarland, deputy U. S. marshal, before me, the subscriber, C. Dart, clerk of U. S. circuit court in and for the eastern district of Texas, and makes oath that he delivered a true copy of the within citation to Daniel D. Atchison, the attorney of record for the plaintiff herein, in person, at Galveston, on the 6th day of June, 1876.

W. R. McFARLAND,
Deputy U. S. Marshal, E. D. T.

Sworn to & subscribed the 6th June, A. D. 1876.

[SEAL.] C. DART,
Clerk U. S. Circ't Court, E. D. T., G.

The foregoing citation on writ of error is endorsed as follows, viz:

C. L., 730, 878. Albert G. Moore vs. Wm. J. Phillips & John
68 Hancock. Citation on writ of error. Filed June 6th, 1876. C. Dart, cl'k.

Bond for writ of error.—Filed June 3d, 1876.

Know all men by these presents that we, John Hancock, George Quinan and John W. Harris are held and firmly bound unto Albert G. Moore, in the full and just sum of one thousand dollars, to be paid to the said Albert G. Moore, his certain attorney, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 3rd day of June, A. D. 1876

Whereas lately, at a circuit court of the United States held in and for the eastern district of Texas, at Galveston, in a suit depending in said court between Albert G. Moore, plaintiff, and John Hancock and William J. Phillips, defendant, No. 730, 878, judgment was rendered against said Hancock and Phillips for the recovery of land therein specified; and the said Hancock and Phillips having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said plaintiff, Albert G. Moore, citing and admonishing to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October, 1876:

69 Now the condition of the above obligation is such that if the said William J. Phillips and John Hancock, defendants, shall prosecute the said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

JOHN HANCOCK, [SEAL.]
Pr. GEO. QUINAN. [SEAL.]
GEOR. QUINAN. [SEAL.]

Sealed & delivered in presence of—
JOHN W. HARRIS. [SEAL.]

Approved by—

AMOS MORRILL,
Dist. Judge.

The foregoing bond on writ of error is endorsed as follows, viz: C. L. 730, 878. Albert Moore vs. Phillips & Hancock. Writ of error bond. Filed June 3rd, 1876. C. Dart, cl'k.

70 UNITED STATES OF AMERICA,
Eastern District of Texas:

I, C. Dart, clerk of the circuit court of the United States for the eastern district of Texas, at Galveston, do hereby certify the foregoing sixty-nine pages of writing to contain a true copy of the record and of all proceedings in the cause, lately pending in said court, numbered on the present law docket of said court 730 (old number 878), entitled "Albert Moore *v.* William J. Phillips and John Hancock," as the same now appears in my office.

To certify which, witness my hand and the seal of said circuit court at the city of Galveston, in said district, on the 29th day of August, A. D. one thousand eight hundred and seventy-six, and of American Independence the 101st year.

[SEAL.] C. DART,
Clerk U. S. Circ't Court Eastern District of Texas at Galveston.

71 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Texas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Albert G. Moore, plaintiff, and William J. Phillips and John Hancock, defendants, in which a final judgment was made and entered by said court on the 25th day of May, A. D. 1876, in favor of said plaintiff and against said defendants for the lands and premises sued for in plaintiff's petition, the said lands and premises being valued at the sum of ten thousand dollars, a manifest error hath happened, to the great damage of the said Wm. J. Phillips and John Hancock, defendants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 30th day of May, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.] C. DART,
Clerk of the Circuit Court of the United States for the Eastern District of Texas at Galveston.

Allowed by—

AMOS MORRILL,
Dist. Judge.

72 (Indorsed:) C. L. 730,878. Albert G. Moore v. Wm. J. Phillips & John Hancock. Writ of error. Filed June 3d, 1876. C. Dart, cl'k.

73 The United States of America to Albert G. Moore, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the 2d Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Texas at Galveston, wherein William J. Phillips and John Hancock are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 3 day of June, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.] AMOS MORRILL,
Dist. Judge.

74 On this sixth day of June, in the year of our Lord one thousand eight hundred and seventy-six, personally appeared W. R. McFarland, deputy U. S. marshal, before me, the subscriber, C. Dart, clerk of U. S. circuit court in and for the eastern district of Texas, and makes oath that he delivered a true copy of the within citation to Daniel D. Atchison, the attorney of record for the plaintiff herein, in person, at Galveston, on the 6th day of June, 1876.

W. R. McFARLAND,
Dep'ty U. S. Marshal, E. D. T.

Sworn to and subscribed the 6th June, A. D. 1876.

[SEAL.] C. DART,
Clerk U. S. Circ't Court, E. D. T., G.

(Indorsed:) C. L. 730, 878. Albert G. Moore v. Wm. J. Phillips & John Hancock. Citation on writ of error. Filed June 6th, 1876. C. Dart, cl'k.

(Indorsement on cover:) No. 274. William J. Phillips and John Hancock, plffs. in error, vs. Albert G. Moore. E. Texas C. C. U. S. Filed 17th October, 1876.

IN SUPREME COURT OF UNITED STATES.

W. J. PHILLIPS AND JOHN HANCOCK, PLAINTIFFS IN ERROR,

vs.

ALBERT MOORE, DEFENDANT IN ERROR.

From the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

BRIEF OF W. P. BALLINGER, with GEO. QUINAN,

Counsel for Plaintiffs in Error.

GALVESTON NEWS PRINT

IN SUPREME COURT OF UNITED STATES.

W. J. PHILLIPS AND JOHN HANCOCK, PLAINTIFFS IN ERROR,

vs.

ALBERT MOORE, DEFENDANT IN ERROR.

From the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

STATEMENT OF THE CASE.

On the 24th of June, 1872, D. D. Atchison, Esq., appeared and made oath in the Circuit Court of the United States for the Eastern District of Texas, at Galveston, that the original petition in a certain cause styled Albert Moore v. Horton & Deadrick had been lost, and he believed there was no copy of the petition in existence nor means of obtaining a copy. That it was a petition in an action of trespass to try title, and for damages, in the ordinary form, for the recovery of one-fourth of a league of land in Wharton county, Texas, originally granted to John Dinsmore, and also for damages for the occupation of the same. Whereupon, he moved the court to permit him to file a petition in the place of the original petition which had been lost, and of the same date as the original. (P. 1.)

Without notice to, or appearance by any one, the court, on the same day, ordered as follows:

ALBERT MOORE,
v.
HORTON & DEADRICK. } *Old Number 878.*

On motion of the attorney for the plaintiff and satisfactory proof that the original petition in this cause has been lost or destroyed without the fault of the plaintiff, it is ordered by the court that the plaintiff have leave to file a petition in the place of the original petition which has been lost, and of the same date as the original; *provided, however,* that this order may be set aside upon good cause shown by the defendants.

On the 16th of May, 1873, the substitute petition was filed, as of the date of April 13, 1860, being the usual form of petition in

trespass to try title, in favor of Albert Moore, a citizen of Maine, alleging ownership of one-fourth of a league of land originally granted to John Dinsmore, and eviction therefrom by the defendants, A. C. Horton and Thomas H. Deadrick, on the 1st of January, 1860.

May 17, 1873, plaintiff filed amended petition alleging the death of said A. C. Horton;

Also that said Thomas H. Deadrick, the other defendant, has ceased to have any further possession of the tract of land described in the original petition; and that said tract of land is now in the possession of one Wm. J. Phillips, who resides on it, and is a necessary party to this suit.

Petitioner alleges his own possession of the premises, and entry and eviction by Phillips therefrom, January 1, 1872.

Service of this petition being acknowledged by Phillips, he moved to dismiss the suit as to him, and demurred because he was not properly made a party, alleging:

That the matters set forth as to him were not proper by way of amendment, but constituted a new and distinct cause of action; and that there was no original action or suit in the court.

As required by the practice in Texas, he also pleaded to the merits: First, not guilty; Second, that the plaintiffs claimed the land sued for by virtue of a pretended grant to John Dinsmore, made April 23, 1833, which was null and void, because prior thereto, August 3, 1824, the same land was granted to one Bartlett Sims; and that his landlord, John Hancock, holds and owns said land under mesne conveyances from said Sims, defendant being the tenant and agent of said Hancock, and that the grant to Sims was and had ever continued the better title.

May 22, 1876, Hancock, as landlord of Phillips, appeared in the case as if he had been made the party instead of Phillips, and substituting himself for Phillips, made and united in the same motion to dismiss, demurrer, and answer, precisely as made in the cause by said Phillips.

Plaintiff, same day, by amendment, alleged that if any such grant was made to Bartlett Sims, that Sims on the 5th of May, 1828, sold and conveyed to one Kinchen Holliman, who abandoned the country, and all of the lands he then pretended to hold by the laws of the land were declared forfeited; and that the land for which this suit was brought was, by the adjudication of the proper officer, declared forfeited, and the same condemned and declared vacant; and that said adjudication was valid, legal and of full force, and said decree has in no manner been annulled By further amendment, plaintiff alleged the adjudication of forfeiture to have been made April 23, 1833, by Miguel Arceniega, commissioner, an officer fully authorized to act in that behalf.

Defendants Hancock and Phillips demurred to the sufficiency of the allegations of forfeiture, denied conveyance by Sims to Holliman; and alleged that Holliman was never a resident, inhabitant or domiciliated citizen of Mexico or Texas, but was always a resident

and inhabitant of the State of Mississippi, and an alien to Mexico or Texas, and that the title to said league of land always remained in said Bartlett Sims until conveyed by him to Thomas F. McKinney the vendor of defendants.

The court sustained the demurrer to the making of Phillips a defendant in this suit; and thereupon plaintiff amended by alleging "that said defendant Phillips entered into possession, claiming under the said Deadrick and holding in privity with said Deadrick as his tenant in said land." (P. 10.) The demurrer being renewed was then overruled by the court. The court also overruled the defendants' demurrer to the allegations of forfeiture by the decree of the commissioner Arceniega. Trial by jury was waived, and the cause submitted to the court. The plaintiff proved the grant to Dinsmore and mesne conveyances down to himself. Defendants proved the grant to Sims, and conveyances down to Hancock, and an admission signed by the counsel in the case:

"That Kinchen Holliman never became a resident or citizen of Mexico or any part of Texas, but always remained and continued a resident and citizen of the State of Mississippi." (P. 30.)

The court found "that the grant to the said John Dinsmore, proved in the cause, was a sufficient forfeiture of the prior grant to said Sims, and of the adjudication of the vacancy of said land at the date thereof," and gave judgment for the plaintiff.

POINTS AND ARGUMENT.

FIRST. The first assignment of error is *that the court erred in permitting the filing on the 16th day of May, 1873, of the copy of the petition by the plaintiff, Moore, against Horton & Deadrick, alleged to have been filed in April, 1860.*

In 1860 there was no Circuit Court in Texas. The Distrrict Court possessed Circuit Court powers, but a Circuit Court was not established in Texas until 1866. 9, Stat. at Large, 1; 12, Stat., 576.

If such petition existed, or ever existed, it was a record of the District Court, and required some proceeding or action of transfer into the Circuit Court.

But wherever it might have existed, that upon mere *ex parte* allegation of its original filing in 1860, and that no copy could now be proved, without any manner of notice to any one, that the petition could be set up and established, and made a valid record of the Circuit Court in 1873, is repugnant to the most primary elements of legal proceedings.

The law of the United States provides mode for replacing the lost records and proceedings, by proper notice and hearing of the question. (U. S. Rev. Stat., § 900; And see Smith v. Watly, 2 Ark., 60; Bond v. Whitfield, 32 Ga., 215; Snyder v. Copes, 5 La. An., 666.)

SECOND. The second assignment of error is *that the court erred in overruling the demurrer to the amendment making Phillips a party defendant.*

1st. Because there was no original action or suit in the court. This has already been discussed. The court permitted a copy of a petition to be placed on its files in 1873, alleged to have been on the files of the District Court in 1860; one of the defendants dead, the other nominal defendant receiving no notice of the proceeding. Parties are essential to a suit. Was this, then, a suit in the Circuit Court? Was Horton a party to this suit? Was Deadrick a party to it? If the plaintiff had proceeded against Deadrick it would have been the merest nullity. If Deadrick was party to this suit or proceeding in 1873, how has he been disposed of? There was not even the formality of abating or dismissing as to Deadrick. He is not further noticed in the record. We think it clear that there was no action pending, or which ever had vitality in the Circuit Court, to which amendment could be made or another party added.

2d. The theory of the case seemed to be that the action was *revived* against Phillips; and that the allegation of his tenancy and privity to Deadrick dispensed further with Deadrick, and made Phillips his proper legal representative or successor. This is too anomalous to require discussion.

3d. The court sustained the objection to making Phillips a party, until his tenancy and privity under Deadrick was alleged, but considered that fact sufficient to authorize his being made a defendant. By virtue of their equity jurisdiction, the courts in Texas and in states where distinction between law and equity is abolished, permit new parties to be made to all classes of cases. But that in a court of law, to an original action brought against a party in possession, upon alleged trespasses, in 1860, upon averment that pending the suit in 1872 he had leased the premises, such lesee should be brought in as a party, against his objection, is, we believe, without precedent, and against all reason.

THIRD. The third assignment of error is—*That the court permitted the reading in evidence of the grant to John Dinsmore of 23d April, 1833, over the objections of the defendants (page 15), as follows:*

1. The grant was void on its face, as it discloses a paramount superior outstanding title in Bartlett Sims.

2. That the Commissioner Arceniega, had no power to make it.

3. That he issued it, of himself, against the consent of the agent of the Empresario, and in violation of the additional article of his instructions as commissioner.

4. That it pretended to declare vacant, lands, as abandoned, without any adjudication thereon of the ayuntamiento, or alcalde, or any lawful authority.

5. That it especially reserves the rights of Bartlett Sims, in the land as first proprietor and lord of the soil—recognizes them and does not purport to divest them.

6. That the said grant is not legal evidence that Hollinan ever owned the land or that Sims ever sold it to him.

We may consider these substantially together:

1. Arceniega had no power to issue this grant. His duties are set out by himself in the grant. He is the "commissioner appointed by the Supreme Government of the State for distributing lands, giving possession thereof and extending titles thereto to the new colonists of the colonization contract of the Empresario Stephen F. Austin outside the ten litoral leagues. * * Using the powers vested in me by the colonization law of the State of March 24, 1825, and the instructions to commissioners, of Sept. 4, 1827, as also the additional article of April 25, 1830, and the colonization contract entered upon by the said Empresario with the Supreme Government of the State."

Now, while it is true, that "where an officer of a former government assumes to act in discharge of an official attribute, in the absence of all evidence to show what are his precise powers he will be presumed to act within the scope of their legitimate extent," this presumption can never be invoked to sustain the acts of an officer outside of or contrary to the usual and well recognized duties of his office."

Jones v. Muisbach, 26 Tex., 237.

The colonization law and the instructions to commissioners prescribe the powers and duties of the commissioners. By these, no power is vested in the commissioner to declare forfeitures. His office is solely, as he sets out in the grant, to "distribute the lands, &c., and extend the titles to the new colonists."

Col. Law; Paschal's Dig., page 218.

The act, then, of Arceniega in assuming to decide that Sims had forfeited his land by selling it to Holliman, or that in fact Sims had sold to Holliman and that Holliman had thereby forfeited it as an

alien, was wholly beyond the scope of his powers and consequently void.

2. The recitals of the grant are that Sims received a title to the land from the Government, that he sold to Holliman a part of it, and that Holliman was an alien. This, then, is not a grant to Holliman as a colonist.

And it is only to grants *to colonists* that the rule is applicable "that such lands *become entirely vacant*" by their abandonment of the country and becoming aliens. This rule is based upon the peculiar language and phraseology of the colonization law.

Holliman v. Peebles, 1 Tex., 705.

Where there is an attempted sale of land by a colonist to an alien the rules which govern the transaction are different.

In Rivers v. Foote, 11 Tex., 672, where a colonist sold land to another capable of taking it, but who afterwards abandoned the country, the court say—

"The difference in the character of the forfeitures sought to be established was, that in the case of the abandonment of the country under the 30th article of the colonization law of the 24th of March, 1825, the act of abandonment operated a present forfeiture and divestiture of the law title *per se*. The land instantly reverted to the government and became a part of the public domain, entirely vacant. Whereas, in other cases the land remained separated from the public domain until the forfeiture was declared, and consequently was not the subject to location and regrant as in the former case."

York v. Gregg, 9 Texas, 85, was a contest between the Brooks grant, issued in 1824, held by a purchaser, and the Kuykendall grant, issued in 1831. The same proceedings of the ayuntamiento, which were proved in Holliman v. Peebles, 1 Tex., had also declared the Brooks grant vacant because of his abandonment of the country. Although the court was composed of the same judges, not a word is said about the land having become "entirely vacant" by the abandonment so as to affect third persons; but the proceedings of the ayuntamiento not being properly proved were treated as essential to show invalidity of the title.

This distinction in the character of the cases is maintained in Marsh v. Weir, 22 Tex., 103. In this case the government made a grant to Marsh. Marsh purported to sell a part of the land to McCormick. McCormick's title was declared forfeited by the ayuntamiento, and Marsh denounced it and obtained a regrant of it from the government. Weir claimed under McCormick, setting up his purchase from Marsh, denying the power of the ayuntamiento to declare the forfeiture of the land, etc. The court determined that, as in fact McCormick was an original colonist, forming part of a family, "Marsh was but an instrument by which the government transmitted to him the title. It was not a sale by the former to the latter. The relation of vendor and vendee did not subsist between the parties to the conveyance, and they are not affected by the principles applicable to that relation. McCormick took the title as a colonist and not otherwise, and he having been made the

instrument of its transmission does not affect the plaintiff with the relations of vendor, or in any manner conclude or affect his rights any more than if the title had passed directly from the government to McCormick without his agency or intervention."

Now, if it were true that, on the sale of land by a colonist to an alien, the land thereby became vacant and was subject to regrant, it would seem to have been useless to discuss the questions raised on the opinion of the court. It might have been determined in a sentence: Marsh sold to McCormick; McCormick abandoned the country; the land thereupon became vacant and as such the commissioner had authority to regrant it. But the validity of the second grant is put upon the ground that it was not a case of sale, that the ayuntamiento had adjudged the land vacant, and that it was therefore vacant. This case also decides that the ayuntamiento was the "respective political authority" to whom was entrusted the power upon abandonment of the country, or the non-performance of other conditions, to declare the forfeiture of the lands, or as it is expressed in the law of 4825, "to take possession of them and recall the titles." (P. 110.) It recognizes the ayuntamiento as a "competent tribunal, proceeding *in rem*, and acting directly upon the status of the thing." (P. 108.)

Barrett v. Kelly, 31 Tex., 476, was an eleven league grant in sale to a Mexican, who conveyed to Barrett, an alien. The court say:

> "From 1833 to 1840 the defendants were liable to have their lands divested from themselves by due process of law, according to the laws of Mexico. * * There is no allegation that any court or political authority ever adjudicated upon the alienage of the defendants, while they were such; and there can be as little question that, without some process of this kind, the rights of the parties to the land were never divested." (481, 482.)

That the land did not, by reason of the facts alleged in the grant, become "entirely vacant," but that on the contrary, proceedings were necessary to declare the forfeiture, seems to be admitted by the commissioner Arceniega in the grant itself. Before the denunciation of the land by Dinsmore he refers it to the Alcalde to inform him of the situation of the land. But the Alcalde replies: "I have nothing to say as I want of facts whereon to form an opinion."

How far the Alcalde may have possessed such powers we need not discuss, as it is apparent that neither by the Alcalde nor Ayuntamiento was any forfeiture of the land ever decreed. That the commissioner was an officer possessing any authority to ascertain and decree a forfeiture, where such decree was necessary, we entirely deny. No case in Texas has ever intimated such a power. If the land was already entirely vacant, if the abandonment by the colonist was *ipso facto*, the commissioner could grant the land. But he was utterly without jurisdiction to affect any pre-existing rights by his decision of the question of abandonment.

Suppose Sims had made a sale to a Mexican residing in some

other colony, or part of the Republic; or made it to another colonist; or mortgaged the land to his creditor in the United States or Europe; or, remaining in Texas, committed a breach of any of the various conditions attached to colonization, had the commissioner jurisdiction to investigate the facts, determinine how far such acts were against the policy of the colonization laws, and impose a penalty or grant any single remedy of relief or forfeiture? Had Sims made sale to Holliman? Could *he* adjudicate this—determine whether made at all—whether absolute or conditional, or the effect produced upon the title? Where is the slightest foundation for attributing any such authority to a commissioner?

Whilst we consider this a question of real property, to be governed by the law of Texas, it may be safe to see the ideas of the "due process of law" or nature of the proceeding held essential in other states in which the Mexican law once existed.

In People v. Folsom, (5 Cal., 378), as to the effect of conveyance to an alien, it was held that, by the civil law as well as the common law, "the king can not take upon himself the possession of an estate said to have escheated until the fact is judicially ascertained by a proceeding in the nature of an inquest of office."

In Merle v. Matthews, (26 Cal., 477), the court say, "A denouncement is a judicial proceeding * * which, in its substantial characteristics, was equivalent to the inquest of office found at common law."

And in Mott v. Rogers, (45 Cal., 379), the question is discussed and doubted whether the Governor possessed the power to revoke a title; but it was held to be clear that by "a purely *exparte* proceeding" he had no such power.

To attribute to the act of the mere executive officer for issuing titles the effect of an "adjudication," of a "*judgment* of a competent *tribunal*," of a "proceeding *in rem*.," of "due process of law," of an "inquest of office found," would, we think, be an abuse of all legal ideas and terms.

3. Should it be held that some adjudication, decree, or proceeding—by whatever name called—of forfeiture, was necessary to divest the pre-existing title, and that the commissioner was an officer competent to render the same, we deny that the act of the commissioner can be construed into a valid decree of forfeiture. He says he "inclines for declaring the tract entirely vacant," but as to the "right vested in Bartlett Sims as first owner and lord of the aforesaid tract he preserves his right to claim it by such means as are afforded by law." This is no decree of the forfeiture, the divestiture, the resumption by the government, of the title first issued to Bartlett Sims. The judicial sentence condemning, annihilating the first title was

the very essential and prerequisite to a second grant. Thus, in Marsh v. Weir, (21 Tex., 110,) the court, speaking of the sentence of the Ayuntamiento on a title, say, when "adjudged a nullity and, in effect, recalled and cancelled by a competent tribunal, it is as though it had never issued, and, to all intents and purposes, a nullity. * * It has no longer a legal entity."

There must not only have been the intention to accomplish this, but effective and fatal language for it. Instead of this the commissioner expressly leaves the rights of Sims in full force. And that this was not destructive of the prior grant we think too obvious for further illustration.

4. It is admitted that Kinchen Holliman, at the time of the alleged sale to him by Sims, was an alien. This appears on the face of the grant and by admission of the fact on the record, (p. 30.) The sale of land, if made to him by Sims, was a nullity. As an alien he could not only not hold land, but he could not acquire land. Whatever be the civil or Mexican law elsewhere this is the settled law in Texas. It is first recognized in Holliman v. Peebles (1 Tex., 673), followed by Middleton v. McGrew (20 Howard, 47). The 6th article of the Mexican decree of 12th March, 1818, 4 Ordinances and Decrees, p. 155, says:

"Foreigners introduced and established in conformity with the regulations now prescribed, or which shall hereafter be prescribed, are under the protection of the laws and enjoy the civil rights conferred by them upon Mexicans, with the exception of acquiring rural landed property, which, by the existing laws, those not naturalized can not obtain." "This provision, says the Supreme Court, 1 Texas, 719, covers all acquisitions of real property, whether by purchase or inheritance."

In the Heirs of Nestor Clay v. Tacitus Clay, 26 Tex., 30, the court say

"The ruling of the court raises the very important question: could an alien or nonresident acquire title to lands by the laws of the Republic of Mexico by purchase? This question was much considered and investigated by the former chief justice of this court, but never authoritativly decided by the court. The researches of counsel, and our own, have enabled us to add but little light to that which was thrown upon the subject by the opinion of Judge Hemphill, in the case of Holliman v. Peebles. But we are of opinion that we can not err in holding that under the laws of Mexico an alien was incapable of acquiring real estate. * * * We are of opinion that the court erred in sustaining an exception to the amended petition which asserted the alienage of defendant; and that, although Nestor Clay had the right to sell the land granted to him after the 26th of March, 1834, Tacitus Clay, if he was an alien and nonresident, as the amended petition alleged, had no capacity to take the land or to acquire any kind of title to the same; and that the sale by Nestor Clay was a nullity if his vendee, as was alleged, was an alien and nonresident."

This case is referred to and approved in Lacoste v. Odam, (26 Tex., 459).

Barrett v. Kelly, (31 Tex., 476), was a suit by plaintiffs on a junior grant to Bowman against the alleged alien purchaser of the senior Galindo grant. The case is an authority as to the necessity of "due process of law" to forfeit the prior grant before the junior grant could be set up against it. Whether the prior title was in the original grantee or his vendee, was wholly immaterial to the case. The title of the vendee had been recognized and acquiesced in for thirty years, and it is sustained by the court.

Whether in this case the title existed in Bartlett Sims or in Holliman is immaterial. Either is fatal to the plaintiff's case. The latter alternative is specially presented to the consideration of the court, though we contend for the interpretation of the law we believe to be sound.

If, then, at the time of Sims' sale to Holliman, Holliman was an alien, as is shown on the face of the grant and is admitted by the parties, the sale by Sims to Holliman was a nullity. Holliman thereby acquired no sort of title to the land, and Sims parted with none. And the grant of the same by Arceniega was a grant of land not vacant, which he had no power to convey, and the grant is, therefore, void.

5. The additional article of the instructions to the commissioners, referred to in the grant to Dinsmore, reads as follows, art. 639, Paschal's Digest:

"The commissioner shall not grant any land, of himself, nor give possession of those traced for *empresas*, so long as these are not concluded, without the knowledge and consent of the Empresario himself, even should the said grant be authorized by the executive."

Now, upon the face of this grant to Dinsmore, it appears affirmatively:

1st. That Arceniega granted it, "of himself."

2d. That he granted it, not only without the consent of the Empresario, but against it. Referring the application of Dinsmore to the agent of the Empresario for information and approval, he is informed:

"That no doubt Holliman, living out of the territory of the Republic, can not preserve a right to the tract acquired by him by way of sale. Inasmuch as the following guarantee exists in the title or transfer made by Sims in his favor: 'and, further, to defend at any time the right of said Kinchen Holliman to the said tract, being always ready to restitute to said Sims the stipulated value which he has paid me for said tract, in case he should forfeit it, owing to a want on my part of right thereto, or power of extending to him a title; and said Sims having expressed to me his wish of guaranteeing to said Holliman the $904 value of said tract paid by him, there is, in my opinion, a prejudice to a third person; and, therefore, I recommend that the subject matter be laid before the Alcalde, or the illustrious Ayuntamiento of this town, in order to obtain their opinion on the subject. I decline to commit myself in that transaction."

Look at this transaction as plainly evidenced in this report. Austin's colonists were, every man of them, immigrants from the United States. Holliman expected to immigrate to Texas. Sims, having fully performed the duty of cultivation as a colonist, and

become absolute owner, "lord of the soil" of his league of land, contracted a fourth of it to Holliman, conditioned upon Holliman's being able to receive the title, the doubt as to this being shown in the face of the transaction; and if he was not, then Sims was to return the money. Return the money. Why? What did those simple pioneers understand? Plainly, so that no man can doubt, that the land would remain Sims', and he would pay Holliman back his money; and, says the Empresario Austin, in substance, with evidently the same understanding, whilst it is true Holliman can't acquire lands in this colony, yet Sims is bound by his obligation, and expresses to me his will to guaranty the price. Therefore, your grant of this land to Dinsmore will be a prejudice to a third person, which I will not approve.

The application is then referred to the Alcalde, Miller, who replies: "In regard to the transaction of the colonist, Sims, I have nothing to say, as I want of facts to form an opinion."

Argument cannot make it plainer that the commissioner, in issuing the grant to Dinsmore, notwithstanding this objection by the Empresario and this reply of the Alcalde, issued it "of himself," and against law.

It may be said that Art. 639 was afterward repealed, but it was law at the time of the grant, and its subsequent repeal could not have the effect to divest Sim's of rights which he had before its repeal.

The grant is imperfect and does not divest Sims of his title to the land. If it is, as the judge held, "a sufficient forfeiture of the prior grant to Sims," then the provision in it that Bartlett Sims preserves his right to claim it by such means as are afforded him by law, is wholly unmeaning. There certainly was no authority vested in the commissioner to grant, as he proposes, to Dinsmore a right to this land, subject to Sims right to the land, and subject to future litigation between the parties.

FOURTH ASSIGNMENT OF ERRORS.

The court erred in rendering judgment for plaintiff upon the facts found, namely: that the grant to Dinsmore "was a sufficient forfeiture of the prior grant to Sims, and of the adjudication of the vacancy of said land at the sale thereof." (P. 14.)

We think we have shown that there was no sufficient forfeiture of Sims' grant or adjudication of the vacancy of the land. It was incumbent upon the plaintiffs, claiming that the land was forfeited, to prove it. And the grant by Arceniega does not do this. The subject has already been presented fully.

There was no proof that Sims ever sold the land to Holliman.

The recitals in the grant to Dinsmore could not be evidence of transactions which had taken place between third persons with respect to the prior grant.

Marsh v. Brooks, 8 How., 223.
Penrose v. Griffith, 4 Binney, 231.
1 Greenlf. Ev., § 23, note 2.
Wharton's Ev., § 1041.

The admitted case is, that Holliman was never a citizen of Mexico or Texas. The settled law of Texas is that any attempted sale to him "was a nullity." There is a class of cases entirely similar in principle. The colonization law of 1825 forbids alienation of lands for the period of six years, the time within which their cultivation was required. Various instances occurred in which alienation was attempted within this period. But the effect was declared to be simply that the conveyance was a nullity, divested no title, passed no title. (Hunt's heirs v. Robinson, 1 Tex., 748; Robbins v. Robbins, 3 Ib., 496; Spetlers v. Clapp, Ib., 498; Dismuke v. Griffin, 10 Ib., 113; Clay v. Cook, 16 Ib., 70; Williams v. Chandler, 25 Ib., 10; Ledyard v. Brown, 27 Ib., 393.) So, alienations, prior to the issuance of titles were held to be absolute nullities. (3 Tex. supra; Emmons v. Oldham, 12 Ib., 18.) The disability of an alien to take or acquire any scintilla of title to a colonist grant under the colonization law is settled law and in accordance with all analogies in Texas. How it might be as to a sale grant (the eleven league titles, sold to raise money), thif case requires no discussion.

If, however, title passed to Holliman, the commissioner had no jurisdiction to determine the fact of alienage, or to divest or forfeit the prior grant, and did not in fact do so by the document issued by him.

FIFTH ASSIGNMENT OF ERRORS.

The court could not by waiver or consent of parties, try issues of fact without a jury, (Act to determine the jurisdiction of circuit courts of the U. S., &c.—18 U. S., Stats. at Large, p. 471, § 3.)

W. P. BALLINGER,
WITH GEO. QUINAN,
Counsel for Plaintiffs in Error.

NOTE.—While this brief is in press, Summers v. Davis, 49 Tex., 541, has been published. It involved the effect of proceedings to annul the Bluford Brooks grant, the same which was referred to in York v. Gregg, 9 Tex., 85, and it is clearly intimated to be the opinion of the court that a decree of forfeiture by the Ayuntamiento, followed by action by the commissioner or empresario, or political authority, was necessary to set aside a grant.

No. 274.

In Supreme Court, U. S.

WM. J. PHILLIPS AND JOHN HANCOCK,

PLAINTIFFS IN ERROR.

VERSUS

ALBERT MOORE, DEFENDANT IN ERROR.

DAN'L D. ATCHISON, COUNSEL OF DEFENDANT IN ERROR.

Shaw & Blaylock, Printers, Galveston.

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I. The law in relation to substituting lost papers was substantially complied with. On proof of their loss to the satisfaction of the Court, they were ordered to be substituted, and this judgment will not be re-examined in an Appellate Court on Writ of Error—see Cook vs. Burnley, 11th Wallace, p. 676. Mr. Justice Clifford uses the following language:

"Nothing can be more certain, in legal decision, than the proposition that an application to supply a lost writ, declaration or other pleading, if accompanied by proof of loss, is in general addressed to the discretion of the Court, and it is well-settled law that decisions which rest in the discretion of a court of original jurisdiction, cannot be re-examined in an Appellate Court upon a writ of error."

II. By the written agreement of the parties, a jury was waived and the cause, both law and facts, submitted to the court.—Printed Rec., p. 13.

III. The point in the case is the validity of the grant to the colonist, John Dinsmore.

On the authority of the Supreme Court of Texas in the case of the heirs of Kinchen Holliman vs. R. Peebles, 1st Texas, 692, the court below sustained the grant. In the case cited, Kinchen Holliman had obtained a grant of a league of land, direct to him as a colonist of Stephen Austin, from the Mexican government. He abandoned the country, and for this cause forfeited the title, and the land was re-granted to the colonist, Robert Peebles. The heirs of Holliman sued Peebles to set aside his grant, and to sustain the grant to their ancestor.

Chief Justice Hemphill, in an elaborate opinion reviewing the law and facts, sustained the grant to Peebles. The difference in the case just cited and the one under consideration is that the same Kinchen Holliman purchased from the colonist, Bartlett Sims, a part of the league granted to Sims as a colonist, and this title of Holliman was also forfeited by him, because he abandoned the country, and on the application of John Dinsmore, also a colonist of Stephen Austin, the grant was made to him. The title to Holliman, by purchase from Sims, was as perfect as his grant from the government. And his abandonment of the country forfeited his title in both cases, as much in the one as the other. Applying the law and the facts in the case cited in first Texas to the one under consideration, and the grant to Dinsmore is valid.

The authority of this case has been oftentimes approved, and as late as the case of Summers vs. Davis (49 Tex., 543), and is now and has been the law of Texas for more than thirty years.

The validity of the grant to Dinsmore, made in 1833, was never questioned nor his possession interrupted until Albert

Horton claimed it as agent for the heirs of Kinchen Holliman; and as such, in 1858, leased to Thomas H. Deadrich, who afterward, in January, 1868, leased it to W. J. Phillips (see Pr. Rec., 23, 24), who was, as he testifies, holding under this lease up to January, 1872, when George Quinan informed him that John Hancock claimed the land, etc. So that Dinsmore's title and possession is invaded at the expiration of a quarter of a century by Horton, claiming under the title by purchase from Sims to Holliman; and forty years afterward John Hancock comes and pleads for himself and so-called tenant—Phillips—that he claims title through Bartlett Sims, and that there is no proof that Sims ever sold to Holliman, or that Holliman ever paid him; and yet Sims had acquiesced in his title to Holliman, to say the least of it, for fifteen years; and there can hardly be a reasonable doubt that he ever intended by any act of his to impair the title which he had made. On the contrary, he acknowledged the sale to Holliman and desired to protect him and make good his title. (Pr. Rec., 16, 17). And now, after so long a lapse of time, it is too late to inquire into the facts and law so minutely and particularly set forth in the recitals of the *testimonio* or grant to Dinsmore. (Pr. Rec., p. 15.) And the more especially so when the highest authority, as already cited, has passed its judgment both on the facts and law. We therefore ask an affirmance of the judgment.

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